84-581

No.

Office Supreme Court, U.S.
FILED
OCT 11 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL W. LASKY,

Appellant,

v.

JOHN VAN LINDT, ET AL.,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

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October 1984

The Daily Record Co., Baltimore, MD 21202

58pp

QUESTIONS PRESENTED

I. Do Sections 7915(2) and 7915(3) of the Unconsolidated Laws of New York, on their face and as applied, violate the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States, by sanctioning the deprivation of liberty interests and tangible property rights through an ex parte process which excludes persons from participating in the process, and does not afford an opportunity for hearing?

II. Does Section 7915(2) of the Unconsolidated Laws of New York (and parallel regulation, 9 NYCRR § 4001.9(a)) violate the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and the right to freedom of speech guaranteed by the First Amendment, both on its face and as applied?

PARTIES TO THE PROCEEDING

The Appellant Michael W. Lasky, a citizen of the United States and of the State of Maryland, was the Petitioner below. The Appellees are John Van Lindt, Chairman, Joseph O'Dea, and Bertram D. Sarafan, Individually and as Members of the New York State Racing and Wagering Board, and the New York State Racing and Wagering Board, all Respondents below.

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APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

REFERENCES TO OFFICIAL AND UNOFFICIAL REPORTS

The memorandum opinion (A. 2a) of the Supreme Court, New York County, Special Term, dated June 21, 1982, has been reported as *Lasky v. Van Lindt,* 115 Misc. 2d 259, 453 N.Y.S.2d 983 (1982). The affirmance of that judgment (A. 9a) by the Appellate Division, First Department, dated November 15, 1983, is listed at 97 App. Div. 2d 986 (1983).

BASIS OF JURISDICTION

This litigation commenced in the Supreme Court, State of New York, with the filing of a Petition under Article 78 of the Civil Practice Law and Rules (CPLR) of New York to compel the Appellees to issue a thoroughbred racing owner's license to the Appellant. The Appellant also prayed for declaratory judgment in accordance with CPLR §§ 103(c), 3001. *See* Petition prayer 5 (A. 18a).[1]

On Septmber 22, 1982, the Supreme Court of the State of New York entered a Judgment (A. 7a) dismissing the Appellant's petition. That judgment was appealed to the Appellate Division of the Supreme Court, First Department, which, by "form" order dated November 15, 1983, affirmed without opinion (A. 9a). Further appeal was taken to the Court of Appeals of the State of New York, which, by "form" order dated June 14, 1984, dismissed the appeal (A. 10a).

On September 12, 1984, the Appellant filed a Notice of Appeal (A. 11a) in the Court of Appeals, State of New York, appealing the latter court's order of June 14, 1984 to this Court, along with all previous orders in the case.

As more fully appears herein, this Court has jurisdiction in this appeal by virtue of 28 U.S.C. § 1257(2). *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975). Where, as here, the highest court of a state refuses to consider an appeal, the lower court becomes the highest court of that state for jurisdictional purposes. *Virginia Ry. Co. v. Mullens*, 271 U.S. 220, 222 (1926). All of the prerequisites to jurisdiction, as set forth in *Webb v. Webb*, 451 U.S. 493 (1981), are present here. The Appellant has included in

[1] Combining Article 78 proceedings with prayers for declaratory relief is sanctioned under New York practice. Kovarsky v. Housing & Development Administration, 31 N.Y.2d 184, 191-92 (1972); Practice Commentary by Joseph M. McLaughlin, N.Y. Cons. Laws (McKinney), Book, 7B, C7081:6.

the Appendix the Petition which initiated this case to show that *the federal constitutional claims were stated in black and white from the start,* and pursued throughout the litigation. An independent, state ground for the decisions below neither exists nor was recited at any point. In the event that this Court ultimately determines that it is without jurisdiction on appeal, this Jurisdictional Statement will, of course, be considered as a petition for writ of certiorari. *See* 28 U.S.C. § 2103.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press[.]

U.S. CONST. amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

U.S. CONST. amend. XIV, § 1:

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. UNCONSOLIDATED LAWS § 7915(2) (McKinney):

> If the state racing commission shall find that the financial responsibility, experience, character and general fitness of the applicant are such that the participation of such person will be consistent with the public interest, convenience or necessity and with the best interest of racing generally in conformity with the purposes of this act, it shall thereupon grant a license. If the commission shall find that the applicant fails to meet any of said conditions, it shall not grant such license and it shall notify the applicant of the denial.

The commission may refuse to issue or renew a license, or may suspend or revoke a license issued pursuant to this section, if it shall find that the applicant, or any person who is a partner, agent, employee or associate of the applicant, has been convicted of a crime in any jurisdiction, or is or has been associating or consorting with any person who has or persons who have been convicted of a crime or crimes in any jurisdiction or jurisdictions, or is consorting or associating with or has consorted or associated with bookmakers, touts, or persons of similar pursuits, or has himself engaged in similar pursuits, or is financially irresponsible, or has been guilty of or attempted any fraud or misrepresentation in connection with racing, breeding or otherwise, or has violated or attempted to violate any law with respect to racing in any jurisdiction or any rule, regulation or order of the commission, or shall have violated any rule of racing which shall have been approved or adopted by the commission, or has been guilty of or engaged in similar, related or like practices. [The use of the term "commission" is equivalent to New York State Racing and Wagering Board. Unconsolidated Laws §§ 7907, 8163.]

N.Y. UNCONSOLIDATED LAWS § 7915(3) (McKinney):

No license shall be revoked unless such revocation is at a meeting of the state racing commission on notice to the licensee, who shall be entitled to a hearing in respect of such revocation. In the conduct of such hearing the commission shall not be bound by technical rules of evidence but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. The action of the commission in refusing, suspending or in revoking a license shall be reviewable in the supreme court in the manner provided by the provisions of article seventy-eight of the civil practice law and rules. Such hearing

may be held by the chairman thereof or by any commissioner designated by him in writing, and the chairman or said commissioner may issue subpoenas for witnesses and administer oaths to witnesses. The chairman or commissioner holding such hearing shall, at the conclusion thereof, make his findings with respect thereto and said findings, if concurred in by two members of the commission, shall become the findings and determination of the commission. [The use of the term "commission" is equivalent to New York State Racing and Wagering Board. Unconsolidated Laws §§ 7907, 8163.]

STATEMENT OF THE CASE

As was alleged in his Petition (A. 12a) below, the Appellant Michael W. Lasky is a citizen of the State of Maryland, and President of a corporation which is engaged in the business of direct mail advertising. One aspect of the corporation's business consists of handicapping and offering racing selections for sale to the public. During August, 1981, Mr. Lasky was licensed as an owner of thoroughbred race horses by the Maryland Racing Commission, and competed in thoroughbred racing conducted in the State of Maryland under its auspices. The Maryland Racing Commission serves essentially the same function in the State of Maryland as the Appellee New York State Racing and Wagering Board serves in the State of New York, and the laws and rules and regulations of and pertaining to these bodies are, for all intents and purposes, substantively identical. Petition ¶ 6 (A. 13a).

During August, 1981, after being licensed in Maryland, the Appellant submitted an original application for a 1981 owner's license to the Appellee New York State Racing and Wagering Board at the latter's offices at Saratoga Racecourse, Saratoga Springs, New York, where racing was being conducted at that time; later, during September, 1981, at Belmont Park, located in the State of New York, the Appellant caused a horse owned by him to

be entered and compete in thoroughbred racing conducted under the auspices of the Appellee New York State Racing and Wagering Board. Furthermore, during the fall of 1981, the Appellant sought licensure as an owner of thoroughbred race horses by the New Jersey Racing Commission. The Appellant frequently competed as such in the State of New Jersey until the thoroughbred race meeting concluded at the end of the calendar year, 1981. Thus, by the end of calendar 1981, the Appellant had never sought licensure anywhere except in the States of New York, Maryland, and New Jersey, and had competed without incident in each of those States. Petition ¶¶7-9 (A. 13a-14a).

On or about November 25, 1981, having already competed as an owner in the States of New York, Maryland, and New Jersey, the Appellant received a telephone call from counsel to the Appellee New York State Racing and Wagering Board informing him, for the first time, that his "application" might be denied, because an employee or agent of the Board had suggested that the Appellant was a "tout." Immediately thereafter, counsel for the Appellant telephoned counsel for the Board questioning the threatened determination, and, on the next working day, the former wrote to the latter explaining that the Appellant was not a "tout."[2] Indeed, this very matter had been considered by both the Maryland and New Jersey authorities whose rules and regulations are substantively identical on this point with those of the Appellees. Petition ¶¶11, 12-15 (A. 14a-15a).

On or about December 21, 1981, counsel for the Board told Appellant's counsel that the application would be denied because the Board did not like the nature of certain business advertising which they attributed to the Appellant, and felt that he was a "tout." At no point did the Board or any of its representatives confront the Appellant

[2] This letter was appended to the Petition (A. 19a-20a).

with any evidence or something other than a conclusion, much less ever afford him a hearing. Petition ¶¶15-16 (A. 15a-16a).

When, by January, 1982, nothing was forthcoming from the Board, the Appellant instituted this action to compel the issuance of a thoroughbred race horse owner's license under Article 78 of the Civil Practice Law and Rules, seeking a declaratory judgment to the effect that Section 7915(2) of the Unconsolidated Laws, and 9 NYCRR §§ 4002.8, 4002.9(a), contravened the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. Accompanying the Appellant's Petition were two affidavits demonstrating, *inter alia*, that the Appellant was not a "tout." In response to the Petition and an Order to Show Cause, the Appellees filed an answer with two affidavits. The Appellees denied most of the Appellant's substantive allegations, and the testimony of the Appellees' affiants conflicted with that of the affiants for the Appellant.

After the litigation had been instituted, but prior to the filing of the answer, the Appellees issued a written Denial of Application (A. 27a), about which the Appellant's only input was standard information supplied with his license application. The denial issued by the Board is a vicious calumny, which was thereafter disseminated to all other racing jurisdictions. In this litigation the Appellant filed a request for disclosure from the Appellees in an effort to secure deposition testimony designed to explore, among other things, the assertions made on behalf of the Appellees in their answer and on their behalf by the affidavits submitted. The Appellees resisted disclosure.

Argument on the Appellant's request for disclosure was held on February 19, 1982, after which the lower court eventually rendered its decision (A. 2a) purportedly on the

merits![3] No further proceedings, disclosure or other discovery was permitted, and the court "decided" the case on conflicting pleadings and affidavits, disregarding the conflict by the simple expedient of ignoring the Appellant's contentions. An appeal followed to the Appellate Division, First Department, which affirmed without opinion (A. 9a). Thereafter, the New York Court of Appeals summarily dismissed an appeal (A. 10a), and an appeal to this court followed.

The questions sought to be reviewed here, which are closely related and often overlap, were presented to each of the courts below. The constitutionality of Section 7915(2) of the Unconsolidated Laws, both on its face and as applied, was explicitly raised in the Appellant's Petition which instituted these proceedings. *See* Petition ¶¶22-25, and prayers 4-5 (A. 16a-18a). After the Petition had been filed, the Appellees issued the Denial of Application (A. 27a) on January 25, 1982, which was incorporated into their answer, thereby injecting the closely related issue of the constitutionality of Section 7915(3) into the proceedings. These matters were the subject of argument in open court on February 19, 1982.[4] The court essentially ignored the constitutional questions concerning which the Appellant expressly sought a declaratory judgment (Petition prayer 5, A. 18a), believing them to be "unnecessary" (A. 6a).[5]

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[3] The opinion has been reported as Lasky v. Van Lindt, 115 Misc. 2d 259, 453 N.Y.S.2d 983 (1982), *aff'd*, 97 App. Div. 2d 986 (1983).

[4] As has been stated, this hearing was called over the Appellant's request for disclosure. During the discussion counsel argued the underlying constitutional issues. Much to the Appellant's surprise, in June, 1982 the court summarily disposed of the case, despite classic disputes of fact presented in the affidavits. There were no further proceedings in that court after the February 19, 1982 hearing.

[5] Regarding the argument that Section 7915(2) was unconstitutionally vague on its face, the court recited in a conclusory

The issues were briefed and argued before the Appellate Division, and presented to the New York Court of Appeals in its version of a jurisdictional statement. Neither of those courts addressed any issues in the case, both appeals being disposed of summarily via "form" orders.

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL AND REQUIRE THE PLENARY CONSIDERATION OF THIS COURT

When the opinion of the lower court was reported in the June 25, 1982 edition of the New York Law Journal, an account of the decision also appeared in a news article beginning on the first page. Presumably, the unnamed author of that news article knew nothing about the case other than what appeared in the lower court's decision. However, although only exposed to such an incomplete and selective account of events, the author was sufficiently discerning to end the news account with the following:

> If he had wanted to, Justice Maresca might have closed his decision with still another Frank Loesser song from 'Guys and Dolls' which would have more succinctly summed up his findings of fact and conclusions of law:
>
> 'Sit Down, You're Rocking the Boat.'

New York L. J. June 25, 1982, at 7, col. 2. As will be discussed herein, we are dealing with a boat that needs some rocking.

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manner that it was not (A. 5a-6a), although implicit in that statement were factual determinations made on the basis of conflicting affidavits. The court erroneously mentioned that the Appellant did not have a "'claim of entitlement'" to the license, and therefore was not entitled to a hearing. The court did not even pay lip service to the facts that: the denial was stigmatizing and directly caused the Appellant to lose status as a licensee in other States; and, the Appellant himself had been previously permitted to compete in New York (Petition ¶8, A. 14a).

This Court has previously had an opportunity to touch upon the role and practices of the Appellee New York State Racing and Wagering Board. *See Barry v. Barchi,* 443 U.S. 55 (1979). Owners of thoroughbred race horses who wish to compete in race meetings at which pari-mutual wagering is conducted in New York must be licensed by the Board. *See* Unconsolidated Laws § 7915(1); NYCRR §§ 4002.1, 4002.2, 4025.4. The Board's refusal to issue a license is judicially reviewable. Unconsolidated Laws § 7915(3); NYCRR § 4002.10. Where, as here, the Board does not permit a disfavored applicant any meaningful participation in the licensing process, there is no risk that predisposition might be shattered, or evidence favorable to the applicant adduced. Consequently, of those applicants denied licensure in this manner, only those few with the determination and wherewithal to do so will obtain judicial redress.

In his application for an owner's license, which is contained in the record, the Appellant indicated, *inter alia,* that he held an owner's license in the State of Maryland, had never been refused a license, had never been barred, ejected, or ruled off by any race track, had never been licensed by the Board, and had never been convicted of any crime. This was the only sort of information ever requested of the Appellant by the Appellees.

After this suit was filed, the Appellees issued a written Denial of Application (A. 27a) which reflected that an "investigation" of Mr. Lasky had been conducted, and recited purported facts and conclusory statements presumably made on the basis of this "investigation." It is difficult to imagine how the Appellees could claim to have conducted an "investigation" when they never spoke with the Appellant or even attempted to do so, particularly in the face of his desire to be heard. Not surprisingly, the result was a series of inaccuracies; what is shocking are the malicious statements and inaccurate conclusions

supposedly drawn from this so-called "investigation" when the Appellees: (1) labelled the Appellant a "tout"; (2) misused documents; (3) stated their dislike of lawful, commercial advertising; and, (4) directly insinuated that the Appellant was involved in criminal activity.

In support of its indictment of the Appellant, the Appellees attached to the Denial of Application what they deemed "examples of solicitations published by" the corporation of which the Appellant is President. Even taken at face value these attachments say nothing of probative value establishing any cognizable nexus between the individual Appellant and his amenability to licensure as a horse owner; in fact, they do not even mention the Appellant by name! Rather, their inclusion raises many more questions than they answer: Where did these items come from? Do the Appellees keep files on persons from whom they have never received license applications, and, if so, why? Why is an attachment dated 1974 deemed pertinent in 1982? What other items, if any, did the Appellees review? Why were the annexed items selected for inclusion, and what was omitted and why? What favorable information was available, and why was it withheld? Questions of this sort abound, and the Appellant should have had an opportunity to pursue inquiry along these lines.

The Appellees proceeded to attack and discredit the Appellant through the use of defamatory statements. Evidently, the Appellees do not like the advertising which they have attributed to the Appellant. Although this is commercial speech which is protected by the First Amendment to the Constitution of the United States, the Appellees apparently believe that their subjective dislike of advertising material can serve as a basis for denying an application to be a licensed horse owner. The mere statement of this suggestion demonstrates its implausibility and illegality.

The fact of the matter is that there is no cognizable nexus between a corporation's legitimate commercial advertising and its President's amenability to licensure. Neither is there anything improper about the advertising in question, nor have the Appellees ever attempted to regulate such material. The First Amendment implications of the Appellees' reference to these materials is discussed *infra*. For now, it is sufficient to note the Appellees' statement to the effect that the Appellant has gained "special knowledge" involving "activity which is contrary to law, or, at least, contrary to the rules of racing" (A. 27a). No basis for this subjective conclusion is identified, which is understandable because none exists. The Appellant submits, and submitted below, that no activity which is contrary to law or racing rules is involved. Certainly, if any illegal racing activity had *ever* taken place the Appellees would have been able to supply particulars. Such activity is not just impolite, it is illegal.

The Appellees continue their insinuation that the Appellant violates the law by stating that although the Appellant's "activities have apparently not been judged to be illegal by any criminal prosecutorial authority, such activities foster and present to the public a view of racing which is contrary to its best interests" (A. 28a). The clear implication of this statement is that although the Appellant has not yet been convicted of anything, it is just a matter of time before he is. It also implies that he has been accused of acting illegally, although perhaps not convicted. In fact, the Appellant has never been accused of any such illegal activity, much less been convicted. The statements by the Appellees are unfounded, blatantly defamatory, and have stigmatized the Appellant. As a legal matter, statements of this nature may not be published by a state regulatory agency in the absence of affording procedural due process to the subject of its denigration.

I.

SECTIONS 7915(2) AND (3) OF THE UNCONSOLIDATED LAWS OF NEW YORK UNCONSTITUTIONALLY SANCTION THE DEPRIVATION OF LIBERTY INTERESTS AND TANGIBLE PROPERTY RIGHTS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

In *Wisconsin v. Constantineau,* 400 U.S. 433, 436-37 (1971), this Court decided that where a state attaches "a stigma or badge of disgrace" to a citizen, "procedural due process requires notice and an opportunity to be heard." The Court continued:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. . . . Only when the whole proceedings leading to the pinning of unsavory label on a person are aired can oppressive results be prevented.

400 U.S. at 437. In order to invoke constitutional protections under the Fourteenth Amendment, stigmatization must be accompanied by the loss of a tangible interest. *Paul v. Davis,* 424 U.S. 693, 708-13 (1976); *Marrero v. City of Hialeah,* 625 F.2d 499, 512-13 n.17 (5th Cir. 1980); *Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 446 (2d Cir. 1980). Such tangible interests have included the loss of the ability to purchase liquor in *Wisconsin v. Constantineau, supra,* the denial of the right to attend school in *Goss v. Lopez,* 419 U.S. 565 (1975), lost employment in *Quinn v. Syracuse Model Neighborhood Corp., supra,* prohibition from future employment in *United States v. Lovett,* 328 U.S. 103 (1946), failure to rehire in *Perry v. Sindermann,* 408 U.S. 593 (1972), and lost business goodwill in *Marrero v. City of Hialeah, supra.*

The Denial of Application issued by the Appellees stigmatized and caused tangible injury to the Appellant. The stigmatizing aspects of the denial include the false

aspersions of being a "tout," engaging in illegal and improper activities, allusions to conflicts of interest, and that his occupation reflects negatively upon his general fitness to be licensed. Publication took place when the Appellees caused all recognized racing authorities and State Racing Commissions in North America to be provided with the denial. Such publication was not only made, but is *required* by NYCRR § 4001.7.

The lower courts' misapprehension of the rights and interests involved in this case may be gleaned from its statement that a license is a "privilege" which may therefore be withheld almost at will (A. 6a). In *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights," and "'rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege."'" *Board of Regents v. Roth, supra*, 408 U.S. at 570 n.9.

Rather than being a "privilege," a license to own thoroughbred race horses is a statutory entitlement which cannot be denied in the absence of meaningful due process being provided. *Bell v. Burson*, 402 U.S. 535, 539, 541-42 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). The Appellant was more than a bare license applicant, as he had been permitted to compete once in the State of New York, had been licensed in Maryland and New Jersey, and had a legitimate expectation of continued licensure in New York and elsewhere.

The most obvious tangible interest which the Appellant lost through the license denial was the ability to compete as a licensed owner in New York. Although perhaps less obvious to the uninitiated, the greatest tangible loss suffered was the effect that the denial had in racing

jurisdictions other than the State of New York. Throughout North America, jurisdictions in which racing is conducted operate under a series of rules designed to give reciprocal effect to rulings made in sister jurisdictions. Typically, such rules provide that the denial of a license by the Racing Commission of any other state shall be grounds for denial in the state in question. *See, e.g.*, Maryland Thoroughbred Rules (COMAR) 09.10.01.48; Rules of the Pennsylvania State Horse Racing Commission § 163.6(d). Where there is no explicit rule on the subject this practice is followed anyway, as the reciprocity concept is firmly entrenched in racing regulation. *See, e.g.*, NYCRR § 4042.4(a),(b); The Jockey Club, Rules of Racing, 208(i), (j), (k).[6]

This reciprocity feature of which the Appellees are acutely well aware had direct ramifications for the Appellant. Although licensed as an owner in New Jersey and Maryland during 1981, when he applied for a license renewal in New Jersey in 1982, his application was not considered because he had been denied a license by the Appellees. Similarly, although he had been licensed in Maryland for 1982 prior to the issuance and publication of the Appellees' denial, thereafter the Maryland authorities sought to give reciprocal effect to the New York ruling. Furthermore, when the Appellant inquired about licensure in Pennsylvania during 1982, he was informed that the New York ruling precluded even the consideration of his application.

The lower court's insinuation that owning race horses "is not one of life's 'common occupations,'" and can therefore be summarily denied, is incorrect, as its reliance upon *Medina v. Rudman*, 545 F.2d 244 (1st Cir. 1976), is misplaced (A. 6a). Although the Appellant does not believe

[6] The effects of reciprocity in harness racing were referred to in Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589, 602 (3d Cir. 1979).

that the prevalance of one's occupation per se has any bearing upon the scope of one's constitutional rights, it is simply incorrect to assert that owning racing horses is uncommon — the Appellees alone annually license thousands of owners. Evidently, the court below did not appreciate that the subject of *Medina v. Rudman* was a license to *own* a greyhound race track, and not a mere license to participate in racing, such as those held by thousands of owners and trainers.

As a constitutional matter, then, the Appellees may not be permitted to dispose of the Appellant in the cursory fashion chosen. Fundamental principles of due process, which are applicable in administrative proceedings, require notice of charges and a meaningful oppportunity to be heard. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). "[A] State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravene[s] . . . Due Process' [citation omitted], and, specifically, in a manner that denies the right to a full prior hearing." *Board of Regents v. Roth, supra,* 408 U.S. at 574. As in *Perry v. Sindermann, supra,* 408 U.S. at 602-03, the Appellant here "has alleged the existence of rules and understandings" supporting his claim entitling him to a hearing.

II.

SECTION 7915(2) OF THE UNCONSOLIDATED LAWS OF NEW YORK VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT AND THE RIGHT TO FREEDOM OF SPEECH GUARANTEED BY THE FIRST AMENDMENT.

The Appellant's advertising, like that of everybody else in the United States of America, is protected under the First Amendment to the Constitution and cannot serve as

a basis for a governmental decision of the sort involved here. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530 (1980); *Linmark Assocs., Inc. v. Township of Willingboro,* 431 U.S. 85 (1977); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — *especially his interest in freedom of speech." Perry v. Sindermann, supra,* 408 U.S. at 597 (emphasis supplied). This is especially true where, as here, it is the content of the speech which the government concerns itself with. *Suffolk Outdoor Advertising Co., Inc. v. Hulse,* 43 N.Y.2d 483, 489 (1977). By considering the commercial advertising of a corporation of which an applicant is an officer as a basis for denying a license to own race horses, the Appellees have inflicted an impermissible chilling effect upon the exercise of rights secured under the First Amendment. *See generally North Carolina v. Pearce,* 395 U.S. 711, 724 (1969); *Dombrowski v. Pfeister,* 380 U.S. 479, 487 (1965). Moreover, where a state might impinge upon free speech interests, an "opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards." *Board of Regents v. Roth, supra,* 408 U.S. at 575 n.14.

In their Denial of Application, Appellees have falsely characterized the Appellant as "tout," and impermissibly concluded from some commercial advertising that the Appellant is unfit for licensure. Whatever the word "tout" has come to mean in common parlance, it has had only one meaning in the context of racing regulation. As was demonstrated in the affidavits filed in support of the Petition in this case, a "tout" acts *fraudulently* by convincing *different* people that *different* horses are going to win the same race, and collecting a fee for this "information" from the person to whom they suggested a

wager on the winning horse. A noted handicapping authority has described the methods of a tout this way:

> Most touts are good enough handicappers to know which four or five horses in a race have the best chances. They 'give' one horse to each of four or five tourists. After the race, they find the winning sucker and demand the proceeds of a $5 or $10 bet.

T. Ainslie, Ainslie's Complete Guide to Thoroughbred Racing 25 (1968).

Touting is a crime in California, and touts are excluded from attendance at race tracks, as well as participating in racing. *See* California Penal Code § 337.2; T. Ainslie, *supra*. Fraud and impropriety are accepted elements of touting in the context of racing regulation. *See United States v. Bagdasian,* 398 F.2d 971 (4th Cir. 1968); *Lewitus v. Colwell,* 479 F. Supp. 439, 444 (D. Md. 1979); California Penal Code § 337.1. The Appellant is not a "tout," and the Appellees' conclusory statement to the contrary is no substitute for the facts.

The Appellees' Regulation, taken from Unconsolidated Laws § 7915(2), provides:

> The [Board] *may* refuse to issue a license . . . if it shall find that the applicant or any person who is a partner, agent, employee, or associate of the applicant has been convicted of a crime in any jurisdiction, or is or has been associating or consorting with any person who has or persons who have been convicted of a crime or crimes in any jurisdiction or jurisdictions, or is consorting or associating with or has consorted or associated with bookmakers, touts or persons of similar pursuits or has himself engaged in similar pursuits, or is financially irresponsible, or has been guilty of or attempted any fraud or misrepresentation in connection with racing, breeding, or otherwise, or has violated or attempted to violate any law with

> respect to racing in any jurisdiction or any rule, regulation or order of the [Board] or shall have violated any rule of racing which shall have been approved or adopted by the [Board] or has been guilty of or engaged in similar, related, or like practices.

NYCRR § 4002.9(a) (emphasis supplied). From its first few words which make its application permissive ("*may* refuse"), this regulation invites a seminar on the constitutional law of vagueness, and it cannot be stretched to preclude licensure of a handicapper who publicly offers racing selections for sale in a legal manner.

While the Appellees have defined "bookmaking" to coincide with the crime described by Section 986 of the Penal Law, they have not defined "tout." *See* NYCRR § 4000.3(h). There is no reason to believe that a person engaged in a lawful occupation cannot hold a license to own thoroughbred race horses, and there is no rational basis for denying licensure to "touts" unless the interpretation of "touting" is confined to proscribed activity as it always has been in racing. Certainly, there is no nexus between one's advertising and his suitability for licensure as a horse owner, and due process requires a rational connection between qualifications and fitness for licensure. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-39 (1957).

The conflict of interest allusions made by the Appellees are similarly without substance. There are no regulations whatsoever in this regard, and there are no regulatory prohibitions against owners disclosing whatever information they wish about their horses (or anyone else's) as they see fit. Owners are free to speak about their horses privately or publicly, may wager as they please, and do both openly and often. Furthermore, if a problem were truly perceived, outright denial would not be the last restrictive regulatory alternative.

The statute and regulation in question are also unconstitutionally vague. In *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972), this Court stated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person the opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

See also Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); *Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971). Each of these dangers of vagueness is present here. Without any analysis the Appellees have attempted to label the Appellant as a "tout," one affiant on behalf of the Appellee making reference to the "modern definition" of tout! Affidavit of Jacob Iberger ¶5. This suggests that "tout" has had a different meaning, which the affiant has not seen fit to disclose. Certainly, where statutes and regulations have remained the same for many years, the fact that a particular word may have taken on different meaning in common parlance (as opposed to regulatory practice), cannot affect the legal interpretation of a prohibitive statute. This is exactly the kind of arbitrary and discriminatory enforcement that such regulations invite, and which the Constitution prohibits.

In addition to the foregoing, the Appellant has alleged that these provisions are unconstitutional as applied. The Appellant must be given the opportunity to prove his assertion that the Appellees themselves have issued licenses, usually without question, to others in similar

positions to the Appellant. Affidavit of Fendall M. Clagett ¶9 (A. 24a). This is a blatant violation of the Appellant's right to the equal protection of the laws. Thus far, the Appellant has been denied any say by the Appellees and the lower courts. He has raised serious issues, and mere denials of the allegations cannot deprive the Appellant of an opportunity to develop and prove his case.

This is an appeal taken as a matter of right from a final decision of the highest court of a state. *Huffman v. Pursue, Ltd., supra,* 420 U.S. at 605. In addition to the merits of the Appellant's case which cry out for remedial action by this Court, plenary consideration is necessary to vindicate important national policies. This Court has enunciated various doctrines which generally encourage, if not demand, presentation of federal constitutional claims in state courts where a claim involves state statutes. Different forms of this general concept were recently reviewed in *Hawaii Housing Authority v. Midkiff,* ___ U.S. ___, 104 S. Ct. 2321 (1984), including abstention and comity based upon federalism. *See, e.g., Younger v. Harris,* 401 U.S. 37 (1971); *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496 (1941).

A principal rationale for these standards is that state courts are competent to consider and give effect to federal claims, and that "[a]lmost every constitutional challenge . . . offers the opportunity for narrowing constructions that might obviate the constitutional problem. . . ." *Moore v. Sims,* 442 U.S. 428, 429-30 (1979). While this Appellant resorted to a state court in the first place primarily in order to avoid abstention-based opposition, those courts, unfortunately in this instance, neither properly considered nor resolved the constitutional issues, and nor did they offer any "narrowing construction" of the statutes involved. Especially because state courts are having more federal constitutional issues directed their way, it is more important than ever that they be made to

recognize these issues and enforce rights guaranteed by the Constitution of the United States.

A further reason for this Court's involvement is the interstate aspect of this case. By the Appellees' actions, the Appellant was stigmatized and lost tangible interests, including the right to compete as an owner in states other than New York.

The Appellant's constitutional rights, largely ignored to this point, must be enforced in this Court. Indeed, the Appellant has not, at any level below, received even the satisfaction of judicial commentary on the issues raised throughout. If plenary consideration is not afforded, this Court should summarily vacate the orders below, and remand with instructions to develop a record and resolve the constitutional issues on the law and facts as adduced.

CONCLUSION

For the foregoing reasons, the Appellant Michael W. Lasky prays that this Court assume jurisdiction of this case, and either grant plenary consideration, or summarily vacate the orders below, and remand the cause with instructions to develop a record with respect to facts pertinent to the constitutional issues present, and to render a decision on the merits on that basis.

Respectfully submitted,

GLENN E. BUSHEL,
MELNICOVE, KAUFMAN, WEINER & SMOUSE, P.A.

36 S. Charles Street,
Baltimore, Maryland 21201,
(301) 332-8500,

Attorneys for Appellant.

October 1984

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL W. LASKY,

Appellant,

v.

JOHN VAN LINDT, ET AL.,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

APPENDIX TO JURISDICTIONAL STATEMENT

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART 1

Index No. 1775/82
#61 of 2/19/82

MICHAEL W. LASKY,

Petitioner,

-against-

JOHN VAN LINDT, Chairman; and JOSEPH O'DEA: and BERTRAM D. SARAFAN, Individually and as Members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

MEMO

MARESCA, J.:

"I've got a horse right here
his name is Paul Revere
and there's a guy who says
that if the weather's clear
can do, can do
This guy says the horse can do
If he says the horse can do
can do, can do

—(Frank Loesser's Can Do from Guys & Dolls)

On January 25, 1982, respondent New York State Racing and Wagering Board denied petitioner's application for a license as a thoroughbred race horse owner. Respondent based its denial upon its finding that, like the character Nicely-Nicely, who sang the above quoted verse, from Guys & Dolls, petitioner was a tout.

Petitioner seeks to annul the determination by the respondent Board and to compel the Board to issue a license to him.

The New York State Racing and Wagering Board has general jurisdiction over all horse racing activities and pari-mutuel betting activities in New York State, both on-track and off-track, and over the corporations, associations and persons so engaged (Unconsolidated Laws, § 7908 and § 8162). In order to compete at any thoroughbred race meeting where pari-mutuel betting is conducted, owners of thoroughbred race horses must be licensed by the Board (Rules and Regulations of the New York State Racing and Wagering Board, 9 NYCRR § 4002.2). The Board is charged with the responsibility for licensing racing participants in accordance with the criteria set forth in Unconsolidated Laws § 7915(2). That section provides, in pertinent part, that the Board:

> "may refuse to issue or renew a license, or may suspend or revoke a license issued pursuant to this section, if it shall find that the applicant . . . is consorting or associating with bookmakers, touts, or persons of similar pursuits, or has himself engaged in similar pursuits . . ."

On petitioner's original application for a thoroughbred race horse owner's license, he stated that he was president of the Baltimore Bulletin, and described his business as "direct mail advertising." Upon submission of the application to the Board, a routine inquiry commenced concerning petitioner's financial responsibility. In aid of their inquiry, the Board contacted the Thoroughbred Racing Protective Bureau (TRPB) (an industry information clearinghouse, used by many racetracks and state racing commissions throughout the country) seeking any files it may have pertaining to petitioner's activities. In addition, representatives of the Maryland Racing Commission were contacted regarding petitioner's status as a licensee, and with the New Jersey Racing Commission regarding his status there as an applicant. Thereafter, petitioner's application was reviewed, together with the TRPB's reports and other accumulated materials.

On January 25, 1982, the Board voted unanimously to deny the application, finding that petitioner is a pro-

fessional tout. The Board noted that Mr. Lasky's publications frequently convey the impression that he has *inside* information that would not be available to even the best legitimate handicapper, suggesting that this information involves activity which is, at the very least, contrary to the rules of racing. It was the Board's belief that licensing Mr. Lasky while in his current profession would create an actual or apparent conflict of interest situation that is harmful to the public's perception of racing.

Petitioner contends that he is not a "tout" within the meaning of the Unconsolidated Laws § 7915(2) and the Rules of the New York State Racing and Wagering Board (9 NYCRR § 4002.8) or within the meaning of "tout" as that term is used as a proscribed activity in the context of racing, and that the Board's determination was arbitrary, capricious and an abuse of discretion. In addition, he claims that, given the Board's construction of "tout" in § 7915(2) of the Unconsolidated Laws and implementing regulations, the statute and regulations are overbroad, vague and irrational, and violate petitioner's rights to due process and equal protection of laws as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the State Constitution.

Petitioner argues that the Board construed "tout" as a handicapper and that "in the absence of fraud and/or the offering of different selections in the same race to different customers," such construction renders the statute unconstitutional.

A handicapper is "one who rates the entries in a race before post time, who figures out the order of finish of a race beforehand. Factors include distance, weight, track condition, riders, past performances, breeding, idiosyncracies of horses, etc." (A Glossary of Racing Terms, issued by the New York State Racing and Wagering Board).

A "tout" on the other hand is "a person who obtains information on racehorses and their prospects and sells it to bettors' (The American Heritage Dictionary [Houghton-

Mifflin Co., 1980 Ed.]; see also, Websters New Twentieth Century Dictionary, Unabridged, Section Edition [1977]). Scarnes New Complete Guide to Gambling (Simon and Shuster, 1974) defines a tout as "a person who makes a living at or away from the track by trying to convince anyone who will listen that he has useful *inside* information." (emphasis supplied).

In reviewing the various representative publications authored by petitioner, the Board concluded that his publications tend to create the impression that he has *inside* information as to which horses will win particular races. A perusal of petitioner publications confirms that the materials do tend to create that impression. The Board's conclusion therefor, that petitioner is a tout as that term is consistently defined in the context of racing, and that his activities are not in the best interests of racing is neither arbitrary, capricious nor an abuse of discretion.

It is important to remember that as a sporting event, horse racing occupies a unique position among the professional sports activities which take place in this state; it is the only sport in which wagering is legal. As such, the state has a vital interest in protecting the integrity of the sport (see, *Barry v. Barchi*, 443 U.S. 55 [1979]; *Hubel v. West Virginia Racing Commission*, 513 F.2d 240 [4th Cir. 1975]) and preventing any potential for abuse. The New York State Racing and Wagering Board, having been delegated the responsibility to regulate racing and pari-mutuel betting, reviews many applications such as the one submitted by Mr. Lasky. Its decision in this case, to deny Mr. Lasky a license is consistent with its responsibilities to the sport, to the public and to the state.

Petitioner's argument that the statute and implementing regulations are unconstitutionally overbroad, vague and irrational is without merit. A fair reading of the language, as measured by common understanding and practice, clearly gives adequate warning of the type of

conduct prohibited. In addition, the legislature, by its enactment of Unconsolidated Laws, § 7915(2) was of the opinion that licensing touts was inconsistent with the public interest, convenience and necessity and not in the best interests of racing generally, and since owning, training and racing horses is not one of life's "common occupations" (see, *Medina v. Rudman,* 545 F.2d 244), it may be subject to the strictest type of regulation.

Petitioner also argues that insofar as the Board reached a determination without affording him the benefit of a hearing, he was denied due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, sections 6 and 11 of the State Constitution. This argument was similarly addressed by the Court of Appeals in *Fink v. Cole,* 1 N.Y.2d 488, where it was stated that the administrative machinery (with respect to processing licenses for thoroughbred racing) "was created for the purpose of determining whether a privilege — a license — should be granted to citizens engaged in the business of horse racing." Since there is no absolute right to a race horse owner's license, petitioner has no "claim of entitlement" that would require the Board to grant him a hearing (see, *Perry v. Sinderman,* 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694).

Finally, petitioner's alternate request that the action be treated as one for a declaratory judgment is unnecessary.

Accordingly, the petition is denied.

Settle Judgment.

Dated: June 21, 1982

J. S. C.

At a Special Term, Part I of the Supreme Court of the State of New York, to be held in and for the County of New York, at the Courthouse thereof, located at 60 Centre Street, New York City, New York, on the 22 day of September, 1982.

PRESENT:

HON. OREST V. MARESCA,

Justice.

JUDGMENT
Index No. 1775/82

MICHAEL W. LASKY,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

—against—

JOHN VAN LINDT, Chairman; JOSEPH O'DEA; and BERTRAM D. SARAFAN, Individually and as Members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

Petitioner, having made application for judgment pursuant to Article 78 of the CPLR annulling a determination of respondent dated January 25, 1982, and the application having come on to be heard at a Special Term, Part I, of this Court on February 19, 1982,

NOW, upon the petition dated January 20, 1982 and exhibits thereto, the affidavit of Melvin A. Steinberg,

sworn to January 18, 1982, the affidavit of Fendall M. Clagett, sworn to January 13, 1982, and the affirmation of John V. Fabiani, Jr., dated January 22, 1982 (all submitted in support of the application); the answer and objections in point of law of the respondents, duly verified on the 8th day of February, 1982, the affidavit of Jacob Iberger, sworn to February 8, 1982, the affidavit with exhibits of Stephen J. Cipot, sworn to February 5, 1982 (all submitted in opposition to the application); John V. Fabiani, Jr. and Glen Bushel having appeared on behalf of petitioner; ROBERT ABRAMS, Attorney General of the State of New York (William H. Mohr, of Counsel), having appeared on behalf of respondents; and the Court (*Maresca*, J.) having rendered a written decision dated June 21, 1982,

NOW, on the motion of ROBERT ABRAMS, counsel to the respondents, it is,

ORDERED, ADJUDGED AND DECREED that the application is denied and the cross-motion is granted and that the petition is dismissed.

ENTER

J.S.C.

FORM B

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 15, 1983

Present — Hon. Theodore R. Kupferman, Justice Presiding.

Joseph P. Sullivan, Sidney H. Asch, Samuel J. Silverman, E. Leo Milonas, Justices.

18008

Michael W. Lasky,

Petitioner-Appellant,

—against—

John Van Lindt and Joseph O'Dea and Bertram D. Sarafan and the New York State Racing and Wagering Board,

Respondents-Respondents.

An appeal having been taken to this Court by the petitioner-appellant from a judgment of the Supreme Court, New York County (Orest V. Maresca, J.), entered on September 27, 1982, which denied and dismissed appellant's petition seeking to review respondents' determination dated January 25, 1982, which denied appellant's application for a thoroughbred race horse owner's license,

And said appeal having been argued by Glenn E. Bushel of counsel for appellant, and by William H. Mohr of counsel for respondents; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

Joseph J. Lucchi
Clerk.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of June A.D. 1984.

Present, HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

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1 Mo. No. 600 SSD 82

Michael W. Lasky,

Appellant,

vs.

John Van Lindt, Joseph O'Dea and Bertram D. Sarafan and the New York State Racing and Wagering Board,

Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the

ground that no substantial constitutional question is directly involved.

DONALD M. SHERAW,
Clerk of the Court.

STATE OF NEW YORK,
COURT OF APPEALS

Mo. No. 600 SSD 82

MICHAEL W. LASKY,

Appellant,

v.

JOHN VAN LINDT, et al.,

Respondents

NOTICE OF APPEAL

TAKE NOTICE, that the Appellant Michael W. Lasky hereby appeals to the Supreme Court of the United States from the order entered in the captioned case dated June 14, 1984, and from all previous orders in this case, entered in this Court and all lower courts.

GLENN E. BUSHEL,
MELNICOVE, KAUFMAN, WEINER
& SMOUSE, P.A.,
36 S. Charles Street,
Suite 600,
Baltimore, Maryland
21201-3060,
(301) 332-8549,
Attorney for the Appellant
Michael W. Lasky.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 11th day of September, 1984, copies of the foregoing Notice of Appeal were mailed to William H. Mohr, Esquire and Hon. Robert Abrams, Attorney General of the State of New York, Two World Trade Center, New York, New York 10047.

GLENN E. BUSHEL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PETITION

Index No. [1775/82]

In the Matter of
The Application of MICHAEL W. LASKY,

Petitioner.

For Judgment under Article 78 of the Civil Practice Law and Rules compelling the issuance of a thoroughbred racing owner's license under Section 7915 of the Unconsolidated Laws

—against—

JOHN VAN LINDT, Chairman; JOSEPH O'DEA; and, BERTRAM D. SARAFAN, Individually and as Members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petition of Michael W. Lasky respectfully alleges:

1. Michael W. Lasky, a citizen of the United States and of the State of Maryland, is engaged in the business of direct mail advertising.

2. The Respondent John Van Lindt is the Chairman of the Respondent New York State Racing and Wagering Board, and the Respondents Joseph O'Dea and Bertram D. Sarafan are Members thereof.

3. The Respondent New York State Racing and Wagering Board, by virtue of Section 7908 and 8162 of the Unconsolidated Laws, has general jurisdiction over horse racing activities in the State of New York, and over persons engaged therein.

4. In order to compete at any thoroughbred race meeting where pari-mutuel wagering is conducted in the State of New York, owners of thoroughbred race horses must be licensed by the Respondent New York State Racing and Wagering Board. Rules and Regulations Section 4002.2

5. The licensing of thoroughbred race horse owners is essentially a registration process for "the purpose of maintaining a proper control over race meetings." Unconsolidated Laws, Section 7915(1). Effective June 1, 1981, an original application for an owner's license requires a $50 fee, annual renewals costing $20.

6. In August, 1981, the Petitioner was licensed as an owner by the Maryland Racing Commission, Thoroughbred Racing Board, and competed in thoroughbred racing conducted in the State of Maryland under the auspices of said Commission. The latter governmental body serves essentially the same function in the State of Maryland as the Respondent New York State Racing and Wagering Board serves in the State of New York. Maryland Code, Art. 78B, Sections 1 *et seq.* Furthermore, the laws and rules and regulations of and pertaining to these governmental bodies are, for all intents and purposes, substantively identical.

7. Thereafter during August, 1981, the Petitioner submitted an original application for an owner's license to the Respondent New York State Racing and Wagering Board at the latter's office at Saratoga Race Course in

Saratoga Springs, New York, where racing was being conducted at that time. As part of the application process, the Petitioner was photographed and fingerprinted as required by law. Unconsolidated Laws, Section 7915(1).

8. During September, 1981, at Belmont Park, located in Nassau County, State of New York, the Petitioner caused a horse owned by him to be entered and compete in thoroughbred racing.

9. During the fall of 1981, the Petitioner sought licensure as an owner of thoroughbred race horses by the New Jersey Racing Commission. The Petitioner competed as such at Meadowlands Racetrack in the State of New Jersey until the thoroughbred race meeting at that plant concluded at the end of the calendar year, 1981. Thoroughbred racing is not scheduled to resume anywhere in the State of New Jersey until sometime in May 1982.

10. The Petitioner has never sought licensure anywhere except in the States of New York, Maryland and New Jersey.

11. On or about November 25, 1981, having already competed as an owner of thoroughbred race horses in the States of New York, Maryland, and New Jersey, the Petitioner received a telephone call from counsel to the Respondent New York State Racing and Wagering Board informing him, for the first time, that his "application" might be denied thereafter, because an employee or agent of the Respondent Board had suggested that Petitioner was a "tout."

12. Section 7915(2) of the Unconsolidated Laws provides in pertinent part:

> The commission may refuse to issue or renew a license, or may suspend or revoke a license issued pursuant to this section, if it shall find that the applicant, or any person who is a partner, agent, employee or associate of the applicant, has been convicted of a crime in any jurisdiction, or is or has been associating or consorting with any person who

> has or persons who have been convicted of a crime or crimes in any jurisdiction or jurisdictions, or is consorting or associating with or has consorted or associated with bookmakers, touts, or persons of similar pursuits, or is financially irresponsible, or has been guilty of or attempted any fraud or misrepresentation in connection with racing, breeding or otherwise, or has violated or attempted to violate any law with respect to racing in any jurisdiction or any rule, regulation or order of the commission, or shall have violated any rule of racing which shall have been approved or adopted by the commission, or has been guilty of or engaged in similar related or like practices. [The use of "commission" in the above statute is equivalent to New York State Racing and Wagering Board. Unconsolidated Laws, Sections 7907, 8163.]

To the same effect is Rules and Regulations Section 4001.9(a).

13. The laws and regulations governing thoroughbred racing in the States of Maryland and New Jersey are substantially identical to the provisions of Section 7915(2) of the Unconsolidated Laws quoted in Paragraph 12 above.

14. The Petitioner is not a "tout" within the meaning of Section 7915(2) of the Unconsolidated Laws, Section 4002.9(a) of the Rules and Regulations, or within the meaning of "tout" as that term is used as a proscribed activity in the context of racing.

15. Immediately following the telephone conversation referred to in Paragraph 11 above, Petitioner's counsel telephoned counsel for the Respondent New York State Racing and Wagering Board questioning the propriety of the allegedly impending decision. On the next working day the former wrote to the latter, outlining Petitioner's position. A copy of this letter, dated November 27, 1981, is attached hereto as Exhibit "A."

16. On or about December 21, 1981, counsel for Petitioner telephoned counsel for the Respondent New York State Racing and Wagering Board and was told that

the Respondent would deny the Petitioner's license application. The reasons given were that the Respondent Board Members did not like the nature of certain business advertising which they attributed to the Petitioner, and felt that he was a "tout." A written denial was to be forthcoming.

17. On or about January 4, 1982, Petitioner's counsel was informed that, barring unforeseen events, the formal denial would be issued by January 7, 1982.

18. At no time did the Respondents ever afford a hearing to the Petitioner, or even request an interview or other less formal inquiry.

19. To date, no formal acceptance or denial of Petitioner's application for a license has been issued.

20. The Respondents failed to perform duties enjoined upon them by law, exceeded their lawful jurisdiction, and rendered a determination in violation of lawful procedure which was affected by errors of law, was arbitrary, capricious and an abuse of discretion.

21. To the extent that Respondents have failed to issue an owner's license to the Petitioner they are in violation of the duties and obligations enjoined upon them pursuant to Unconsolidated Laws, Section 7915(2).

22. To the extent that Respondents based their determination upon disenchantment with lawful advertising engaged in by Petitioner in the course of his business activities, said action was illegal and in violation of Petitioner's rights guaranteed by the First Amendment to the Constitution of the United States, and Article 1, Section 8 of the Constitution of the State of New York.

23. To the extent that Respondents construed "tout" as that word is used in Unconsolidated Laws, Section 7915(2), or any Regulations implementing same, as a handicapper who publicly offers racing selections for sale in a legal manner, in the absence of fraud and/or the offering of different selections in the same race to different

customers, said statute and Regulations, and the Respondents' construction thereof, are unconstitutional, vague and irrational, both on their face and as applied, in violation of Petitioner's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and Article 1, Section 11 of the Constitution of the State of New York.

24. To the extent that Respondents refused to issue an owner's license to the Petitioner under color of a portion of Unconsolidated Laws, Section 7915(2), or any Regulations implementing same, other than those referred to in Paragraph 21 above, said statute and Regulations, and Respondents' construction thereof, are unconstitutional, overbroad, vague, and irrational, both on their and as applied, in violation of Petitioner's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 11 of the Constitution of the State of New York.

25. The Respondents denied due process of the law to the Petitioner, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Sections 6 and 11 of the Constitution of the State of New York, and Unconsolidated Laws, Section 7915(3), by making an ex parte determination without benefit of hearing or confronting Petitioner, or affording Petitioner an opportunity to participate.

26. This Court has jurisdiction to entertain this Petition by virtue of Unconsolidated Laws, Section 7915(3).

27. No previous application for the judgment herein requested or the relief herein sought has been made to any other court or judge.

WHEREFORE, Petitioner respectfully prays that:

(1) Under Article 78 of the Civil Practice Laws and Rules an order be made compelling and directing the Respondents to issue a thoroughbred race horse owner's license to the Petitioner.

(2) Under Article 78 of the Civil Practice Laws and Rules a review be made of the Respondent's refusal to issue a thoroughbred race horse owner's license to the Petitioner.

(3) The Respondent's refusal to issue a thoroughbred race horse owner's license to the Petitioner be annulled, and the Respondents directed to issue such a license to the Petitioners.

(4) This Court enter a judgment or decree declaring that Section 7915(2) of the Unconsolidated Laws, and Rules and Regulations, Section 4002.8 and 4002.9(a) contravene the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and Sections 6, 8, and 11 of Article 1 of the Constitution of the State of New York.

(5) To the extent that the relief sought herein is beyond the scope of Article 78 proceedings, that this Court consider such aspect of this action as being for declaratory judgment in accordance with CPLR 103(c), 3001.

(6) For such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
January 21, 1982

JOHN V. FABIANI, JR.,
KROLL, KILLARNEY, POMERANTZ & CAMERON,
500 Fifth Avenue — 15th floor,
New York, New York 10110.

GLEN BUSHEL,
MELNICOVE, KAUFMAN, WEINER & SMOUSE, P.A.,
36 South Charles Street,
Baltimore, Maryland.

LAW OFFICES OF

Melnicove, Kaufman, Weiner & Smouse, P.A.

November 27, 1981

Salvatore R. Curiale, Esquire
New York State Racing and Wagering Board
2 World Trade Center
74th Floor
New York, New York 10047

Dear Mr. Curiale:

Thank you for speaking with me on November 25 concerning Michael W. Lasky's thoroughbred owner's license. As you know, Mr. Lasky submitted his application during August, and raced thereafter at Belmont. During our conversation you told me that, at this late date, a Mr. Cipot has questioned the license, purporting to rely upon McKinney's Unconsolidated laws § 7915. In effect, I gather, Mr. Cipot contends that Mr. Lasky is a "tout" within the meaning of the statute. This is absolutely untrue, and has already been the subject of a proceeding in Maryland.

For your general background information, Mr. Lasky is a licensed owner in Maryland and New Jersey. (The New Jersey license is technically provisional until Mr. Lasky submits his fingerprints and photograph at the Meadowlands, which will occur shortly.) The Maryland Racing Commission issued Mr. Lasky a license after conducting a hearing on August 12. At that time, no one with any racing background claimed that a "tout" in the context of racing regulation was equivalent to a public selector. The uncontradicted evidence was that a "tout" in racing is one who convinces different people to wager on different horses *in the same race*, and, after the race, extracts money from the winning bettor. Naturally, this winning bettor usually continues as a prime participant, at least for awhile. The essence of touting, in a legal racing sense, is the fraud on the public, and it is this fraudulent aspect which led to its prohibition in racing.

In California, touting is a misdemeanor. Section 337.1 of the California Penal Code defines "touting" for its purposes as one "whoe knowingly and designedly *by false representation*. . . ." (Emphasis supplied.) A copy of this provision is enclosed. (By the way, Mr. Lasky makes public selections in California, is registered to do so with the California Horse Racing Board, and has never been accused of touting.) Also enclosed is an excerpt from Ainslie's Complete Guide to Thoroughbred Racing 25 (1968), which truly conveys the essence of touting in its accepted racetrack sense. The hearing before the Maryland Racing Commission was on the record, although not transcribed. If necessary, however, that can be accomplished. Furthermore, if you would like to speak with the Assistant Attorney General who represents the Maryland Racing Commission, and is familiar with the case, I would be pleased to supply his name and telephone number.

If the facts are examined, as they must be, the Racing and Wagering Board cannot legally undermine Mr. Lasky's licensure. As we discussed over the telephone, there are many more chinks in an attempt to disturb licensure on the basis of touting than the few mentioned in this letter. Please advise immediately if you would like any further information or have any questions. Mr. Lasky will, of course, cooperate with any legitimate inquiries. However, he will not countenance disparate treatment. While we all hope that it will not become necessary, Mr. Lasky is prepared to institute a federal proceeding, with pendant state claims, for injunctive and monetary relief against the appropriate authorities and persons, individually and as officials, in the event his rights are infringed.

I would appreciate being kept apprised of developments, and again encourage you to ask for any further information you may deem helpful. We will do our utmost to cooperate and serve the best interests of racing.

Very truly yours.

GEB/rd/wp

GLENN E. BUSHEL.

cc: Mr. Michael W. Lasky

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AFFIRMATION

In the Matter of
The Application of MICHAEL W. LASKY,

Petitioner,

For Judgment under Article 78 of the Civil Practice Law and Rules compelling the issuance of a thoroughbred racing owner's license under Section 7915 of the Unconsolidated laws

—against—

JOHN VAN LINDT, Chairman; JOSEPH O'DEA: and, BERTRAM D. SARAFAN, Individually and as Members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

JOHN V. FABIANI, JR., an attorney duly licensed to practice law before the courts of the State of New York and aware of the penalties for perjury, hereby affirms:

He is an attorney for the Petitioner Michael W. Lasky and makes this affirmation upon personal knowledge as well as upon information and belief in the facts and circumstances in the papers and file retained in this office for the prosecution of this Special Proceeding.

This affirmation is submitted in support of Petitioner's application for an order:

(1) Under Article 78 of the Civil Practice Laws and Rules an Order be made compelling and directing Respondent's to issue a thoroughbred race horse owner's license to the Petitioner.

(2) Under Article 78 of the Civil Practice Laws and Rules a review be made of the Respondent's refusal to issue a thoroughbred race horse owner's license to the Petitioner.

(3) The Respondent's refusal to issue a thoroughbred race horse owner's license to the Petitioner be annulled and the Respondents directed to issue such a license to the Petitioners.

(4) This Court enter a judgment or decree declaring that Section 7915(2) of the Unconsolidated Laws, and Rules and Regulations, Section 4002.8 and 4002.9(a) contravene the First, Fifth and Fourteenth Amendments to the Constitution of the United States and Sections 6, 8, and 11 of Article 1 of the Constitution of the State of New York.

(5) To the extent that the relief sought herein is beyond the scope of Article 78 proceedings, that this Court consider such aspect of this action as being for declaratory judgment in accordance with CPLR 103(c), 3001, and preliminary thereto, directing the Respondents to appear and give testimony before a Notary Public in accordance with Article 31 of the CPLR.

No prior application has been made for the relief sought herein.

The essential facts which form the basis of this special proceeding are set forth in full detail in the Petition.

Your affirmant submits that extensive disclosure of the Respondents is necessary for the proper preparation of Petitioner's case. That disclosure consists of the depositions of all Respondents. In order that Respondents may have all relevant records available for the depositions, it is suggested that the depositions be conducted at the offices of the Respondents.

WHEREFORE, your affirmant respectfully requests that the Court grant the relief requested in the Petition and direct the taking of depositions of all Respondents on

a date or dates certain to be set by this Court and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
January 22, 1982

JOHN V. FABIANI, JR.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AFFIDAVIT

Index No. [1775/82]

In the Matter of
The Application of MICHAEL W. LASKY,

Petitioner,

against

JOHN VAN LINDT, Chairman; and JOSEPH O'DEA; and, BERTRAM D. SARAFAN, Individually and as Members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

I, FENDALL M. CLAGETT, hereby make oath that I am competent to testify as to the matters stated herein, and that the following facts are true to my personal knowledge:

1. I reside at Larking Hill Farm, Harwood, Maryland 20776.

2. I hold an A.B. degree from Princeton University, conferred in 1941, and an LL.B. degree from Harvard University, conferred in 1948.

3. I have been deeply involved with thoroughbred racing since 1948, having been a breeder and licensed owner of thoroughbred race horses since 1951.

4. I have been a licensed owner of thoroughbred horses in the States of New York, Kentucky, Florida, New Jersey, Pennsylvania, Delaware, Maryland, Rhode Island, West Virginia, Massachusetts, Illinois, Michigan, and New Hampshire.

5. I have served, and continue to serve, as President of the Horsemen's Benevolent Protective Association, Maryland-Delaware-West Virginia Division, continously since 1967, save for a two-year interval during that time.

6. For the past six years, I have served as Vice President of the national Horsemen's Benevolent Protective Association.

7. Professional handicappers, like Michael W. Lasky, are not "touts." Handicapping is not touting. Handicapping is an art and a science, and is well recognized and respected by the racing community.

8. A "tout," in the sense that the word is used in racing, is one who goes from one person to another fraudulently inducing or persuading different people to place wagers on different horses in the same race.

9. Many persons who handicap horses for remuneration have been licensed owners of thoroughbred horses in the United States, including the State of New York, and I am unaware of any such person ever having been denied an owner's license on such a basis.

FENDALL M. CLAGETT

STATE OF MARYLAND
COUNTY OF ANNE ARUNDEL, TO WIT:

I HEREBY CERTIFY, That on this 13th day of January, 1982, before me, a Notary Public of said State and Anne Arundel County, personally appeared FENDALL M. CLAGETT and made oath that the matters contained in

the foregoing Affidavit are true to the best of his knowledge and belief.

ROSALIE NEUBECK,
Notary Public.

My Commission Expires: July 1, 1982

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AFFIDAVIT

Index No. [1775/82]

In the Matter of
The Application of MICHAEL W. LASKY,

Petitioner,

—against—

JOHN VAN LINDT, Chairman; and JOSEPH O'DEA; and, BERTRAM D. SARAFAN, Individually and as members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

I, MELVIN A. STEINBERG, hereby make oath that I am competent to testify as to the matters stated herein, and that the following facts are true to my personal knowledge:

1. I reside in Baltimore County, Maryland, and maintain offices for the practice of law at 305 West Chesapeake Avenue, Towson, Maryland 21204.

2. I am a member of the bar of the Court of Appeals of Maryland.

3. I am, and for the last 16 years have been, a member of the Senate of Maryland.

4. For the last three years I have served as Chairman of the Finance Committee of the Senate of Maryland, through which all legislation concerning racing is channeled and reviewed.

5. Governor Harry Hughes appointed me to a special task force on racing in 1979, and I also serve as Co-Chairman of the Joint Sub-Committee of the General Assembly studying the racing industry.

6. I have been interested in racing for over 25 years.

7. Between 1973 and 1978 I was a licensed owner of thoroughbred race horses, and also became involved in breeding. I have held owner's licenses from the States of New Jersey, Maryland, and Florida.

8. A handicapper, like Michael W. Lasky, is completely different from a "tout." Touting is a recognized fraud. A "tout" goes to different people with different names of horses in a particular race, and can be assured of supplying one person with the name of the winner. Each person is persuaded that he will have the winner, which is the basis of the fraud.

9. I am unaware of any ground upon which an owner's license could legitimately be denied to Michael W. Lasky.

MELVIN A. STEINBERG

STATE OF MARYLAND
COUNTY OF BALTIMORE, TO WIT:

I HEREBY CERTIFY, That on this 18th day of January, 1982, before me, a Notary Public of said State and Baltimore County, personally appeared MELVIN A. STEINBERG and made oath that the matters contained in

the forgoing Affidavit are true to the best of his knowledge and belief.

JACQUELINE M. FEINBERG,
Notary Public.

My Commission Expires: July 1, 1982.

NEW YORK STATE RACING AND WAGERING BOARD
DIVISION OF THOROUGHBRED RACING

In The Matter of
Michael Warren Lasky

DENIAL OF APPLICATION

The applicant, Michael Warren Lasky, a/k/a Mike Warren, William Cashem has applied for a license as an owner of thoroughbred race horses. In his license application he lists his employment position as President of the Baltimore Bulletin and describes his business as "direct mail advertising."

Investigation of Mr. Lasky indicates that at least since 1974 Mr. Lasky has authored and published a multitude of tip sheets under various names including the Baltimore Bulletin, the National Turf Club and the California Turf Club. Examples of solicitations published by Mr. Lasky are annexed. Mr. Lasky is a professional tout engaged in the activity of touting.

The material published in many instances seeks to create the impression that Mr. Lasky possesses "inside information" as to which horse will win a particular race. The clear inference of much of the published material is that this information goes beyond factors which would be available to even the best legitimate handicapper with a suggestion that the information of which he has special knowledge involves activity which is contrary to law or, at least, contrary to the rules of racing. The applicant sells

this information to his customers in the form of his selections. He typically receives a flat fee and, or a percentage of the subscribers winnings from wagers placed on his selections, if any.

Although Mr. Lasky's activities have apparently not been judged to be illegal by any criminal prosecutorial authority, such activities foster and present to the public a view of racing which is contrary to its best interests. Licensing Mr. Lasky, as an owner (or in any capacity) while he is engaged in his current occupation could result in the clothing of Mr. Lasky with a false credibility and could be taken by the public as an endorsement by this Board of an activity which the Board feels is not in racing's best interest.

Furthermore, licensing the applicant as an owner while he is engaged in his current profession would create an actual or apparent conflict of interest situation which would be harmful to the public's perception of racing. The applicant earns his living by selling his racing selections. He receives a portion of the proceeds of winning wagers placed upon those selections by his customers. Thus, he has a real monetary interest in the performance of those horses selected by him and the prices that they pay if they are successful. He is in a position to affect the odds in any given race. As a licensed owner he could be participating in races in which he has made selections recommending other horses to his clientele. Also, prior selections of horses in past races competing later against his own horses could affect the odds in those races. All in all, the potential for conflict of interest is there and readily perceivable by the public.

Accordingly, and pursuant to Unconsolidated Laws § 7915 and 9 NYCRR § 4002.8 the application of Michael Warren Lasky to be licensed as a thoroughbred race horse owner is denied in that to license him while he is engaged in his current occupation would be contrary to the best

interest of racing and that his current occupation reflects negatively upon his general fitness to be licensed.

NEW YORK STATE RACING AND WAGERING BOARD.

THOMAS C. DAVIDE,
Secretary to the Board.

Dated: New York, New York
January 25, 1982.

No. 84-581

Supreme Court, U.S.
FILED
JAN 5 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

MICHAEL W. LASKY,

Appellant,

against

JOHN VAN LINDT, Chairman of the New York State Racing and Wagering Board; JOSEPH O'DEA and BERTRAM D. SARAFAN, individually and as members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Appellees.

On Appeal from the New York Court of Appeals

MOTION TO DISMISS

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No. 84-581

IN THE

Supreme Court of the United States

October Term, 1984

MICHAEL W. LASKY,

Appellant,

against

JOHN VAN LINDT, Chairman of the New York State Racing and Wagering Board; JOSEPH O'DEA and BERTRAM D. SARAFAN, individually and as members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Appellees.

On Appeal from the New York Court of Appeals

MOTION TO DISMISS

Opinions and Orders Below

The jurisdictional statement (at 1) does not reference the June 14, 1984 order of the New York Court of Appeals dismissing *Lasky* v. *Van Lindt, et al.*, after summary review, on the ground that the appeal did not directly involve a substantial constitutional question. The order of the Court of Appeals is reported at 62 N.Y.2d 942 and is reproduced at 10a-11a of the appendix ("App.") to the jurisdictional statement.

The jurisdictional statement (at 1) does not reference the January 25, 1982 decision of appellee New York State Racing and Wagering Board (the "Board") denying appellant an owner's license to race a thoroughbred horse at the several tracks within the state where betting is legal. The decision is not reported. Appellant has reproduced the decision, in part, at App. 27a-29a. He has omitted five examples of his publications which the Board included. *See* decision at App. 27a, stating that examples are annexed. In the examples, appellant promises racing fans sure winners for a fee. The examples are reproduced in the supplemental appendix to this motion. Appellees seek the printing costs for the supplemental appendix ("S. App.") from appellant. *See* Supreme Court Rule 15(1)(j)(ii).

State Statute Involved

The jurisdictional statement (at 3-5) sets forth § 7915 (2),(3) of the New York Unconsolidated Laws, title 21 (McKinney 1979). Both subsections were repealed, with all of title 21, by L. 1982, c. 865, § 2, effective April 1, 1983. They were reenacted, with technical amendments not here relevant, by § 1 of the same law. Chapter 865, § 1, also recodified title 21 as chapter 47-A of the New York Consolidated Laws and renumbered the sections. Former § 7915(2) is now § 213(2) of the New York Racing, Pari-Mutuel Wagering and Breeding Law (McKinney 1984). Former § 7915(3) is now § 213(3) of that law.

Statement of the Case

New York permits legal betting on only one sport—horse racing. N.Y. Const. art. 1, § 9; New York Racing, Pari-Mutuel Wagering and Breeding Law § 222 (McKin-

ney 1984), formerly New York Unconsolidated Laws § 7952 (McKinney 1979). To assure the integrity of the sport, the New York State Racing and Wagering Board (the "Board") regulates all racing and betting activities within the state, including the licensure of thoroughbred owners. Racing, Pari-Mutuel Wagering and Breeding Law §§ 101, 213(1),(2), formerly Unconsolidated Laws §§ 7915(1),(2), 8162. The Board must deny a thoroughbred owner's license unless it is satisfied that the applicant has the financial responsibility, experience, character and fitness to participate in the sport in a manner consistent with the best interests of racing and the public interest. Racing, Pari-Mutuel Wagering and Breeding Law § 213(2). The Board also may deny a thoroughbred owner's license if it finds that the applicant is engaging, or has engaged, in conduct inimical to the sport as defined by § 213(2). Section 213(2) lists, among other kinds of conduct, the occupations of bookmaker and tout, "similar pursuits," consorting with persons so engaged, and fraud or misrepresentation, or attempted fraud or misrepresentation, in connection with racing. See text of § 213(2), set forth, in relevant part, in the jurisdictional statement at 4.* Owners whose applications for licenses are denied by the Board are not entitled to predetermination administrative hearings. Racing, Pari-Mutuel Wagering and Breeding Law § 213(3), formerly Unconsolidated Laws § 7915(3), text set forth, in

* The jurisdictional statement (at i, 7, 19) references § 4002.9(a), New York Codes, Rules and Regulations, title 9, the implementing regulation for Racing, Pari-Mutuel Wagering and Breeding Law § 213(2). The text of the regulation and the text of the relevant part of the statute are the same in all material respects. The regulation is not separately addressed in this motion.

relevant part, in the jurisdictional statement at 4.* The owners are entitled to seek immediate relief from the state courts in proceedings against the Board under Article 78 of the New York Civil Practice Law and Rules. *Ibid.*

Michael W. Lasky, a/k/a William Cashem, a/k/a Mike Warren (the "appellant") filed an application with the Board for a thoroughbred owner's license on August 20, 1981. He listed himself as the president of the *Baltimore Bulletin* which he styled as a "direct mail advertising" publication. Lasky License Application at 2 ¶ 15. During its investigation of the appellant, the Board asked for and received a report from the Thoroughbred Racing Protective Board ("TRPB"), a nationally accepted source of information about the sport. App. 3a; affidavit of Stephen J. Cipot, Assistant Director of Investigations and Audits for the Board, sworn to February 5, 1982 ("Cipot affidavit"), at ¶ 6. The TRPB report included examples of appellant's publications which disclosed that the *Baltimore Bulletin* was a tip sheet and that appellant published other tip sheets—open letters from the National and California Turf Clubs and *Mike Warren Sports*—under the Cashem and Warren aliases. App. 27a-28a; Cipot affidavit at ¶¶ 7, 8.**

* The jurisdictional statement (at 10) references § 4002.10, New York Codes, Rules and Regulations, title 9, the implementing regulation for Racing, Pari-Mutuel Wagering and Breeding Law § 213 (3). The text of the regulation and the text of the relevant part of the statute are the same in all material respects. The regulation is not separately addressed in this motion.

** Appellant asks the Board's source for the examples of his publications. Jurisdictional Statement at 11. His question was answered at the outset of state court proceedings—the TRPB report. Cipot affidavit at ¶¶ 6-8. Although appellant repeatedly characterizes

(footnote continued on next page)

The Board considered eight examples of appellant's publications from the TRPB report. It annexed five to its January 25, 1982 decision. App. 27a; S. App. 1a-21a. Two are open letters from the National Turf Club. The first letter (S. App. 1a-6a) identifies appellant, a/k/a William Cashem, as the Club's Racing Secretary. *Id.* at 1a. It then tells racing fans that "Cashem will . . . supervise one of the biggest . . . stable killings of all time at Saratoga on August 18" (*ibid.*) and "will make certain . . . [that they] collect on a no ifs, ands or buts winner." *Id.* at 4a. The letter characterizes Cashem's information as a "closely guarded secret" that leaves "nothing to chance." *Ibid.* It concludes by offering the tip for $10. *Id.* at 5a-6a. The second letter (*id.* at 7a-9a) tells racing fans about a "completely foolproof" "coup" at Belmont Park on June 28 in which "every possible risk will be considered and attended to." *Id.* at 7a, 8a. It concludes by offering the "100% perfect" tip for $100. *Id.* at 9a. The third example (*id.* at 10a-13a) is a signed issue of *Mike Warren Sports* in which appellant, using that alias, "guarantee[s]" a winner at Santa Anita on October 3 to the first "one hundred" to send in $100. *Id.* at 10a, 11a, 12a. The issue goes on to explain that the pre-payment is necessary because the "information" is "so strong"—appellant claims it is from "a man who is never wrong"—that "I had to lay out the money [for it] in advance." *Id.* at 11a. The fourth and fifth ex-

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the examples as "misused", "defamatory" and not probative (jurisdictional statement at 11, 12, 17-18; brief for petitioner-appellant in the Appellate Division, Second Department at 10), he does not disown the Cashem and Warren aliases. Nor does he identify a phrase, or even a word, in the examples as untrue or as inaccurately transcribed or reproduced. *See* Jurisdictional Statement at 11, accepting the examples "at face value" and Appellate Division brief at 10, accepting the accuracy of the examples *arguendo* without addressing them again.

amples, respectively an advertisement from the April 11, 1981 issue of the *New York Daily News* (*id.* at 14a-15a) and an open letter, dated November 25, 1974, to friends of the *Baltimore Bulletin* (*id.* at 16a-21a), include photographs of the appellant under the Mike Warren alias. The advertisement says that appellant has learned to "rob race tracks legally" and that he is prepared to tell the reader how to do so. *Id.* at 14a. The letter says that the appellant has a "new way to sure-fire racing profits" (*id.* at 16a) and that his success depends on taking "mighty good care of" his "contacts . . . [and] connections" who keep him "informed." *Id.* at 20a. It then observes that "information costs money" and that "I have no way to pay my sources except from pay-win profits." *Ibid.* It concludes by asking for $5 to participate in the system, an amount the participant can deduct from the proceeds of $5 win wagers he promises to remit on each winning tip. *Ibid.*

Two articles and a letter from the *Baltimore Bulletin*, all using the Mike Warren alias, are the examples of appellant's publications included in the record but not annexed to the Board's January 25 decision. One article tells the reader he can't lose at Saratoga on August 27. The "*Baltimore Bulletin* and Mike Warren" "guarantee" the results "100%." To get the tip, the reader must pay $10 and the proceeds of a $5 win wager. The other article describes *Under the Shedrow*, a publication of the *Baltimore Bulletin*, that "lets you in on winners." The article includes a coupon, to return with a $10 fee, that acknowledges that the sender is "guaranteed a winner" and tells him to call "Mike" on the day of the race to get the tip. In the letter, appellant says that he is going to Saratoga to

"supervise" his "network of information [gatherers]" so he can provide the "hottest and freshest inside information." Readers are instructed to arrange for appropriate payments when they call Mike for the tips.*

On November 25, 1981, the Board, through counsel, informed appellant that it was likely that his application for a thoroughbred owner's license would be denied because he was a tout within the meaning of Racing, Pari-Mutuel Wagering and Breeding Law § 213(2), i.e. an individual who sells purported winning selections in horse races for money. App. 4a, 5a, 14a ¶ 11. A series of communications between appellant's counsel and the Board's counsel ensued. App. 15a-16a ¶¶ 15-17. They include a letter from appellant's counsel in which he claims that, in racing circles, a tout is an individual who sells different winning horses in the same race to different bettors. App. 19a. The Board denied appellant's application on January 25, 1982, following its receipt of the letter. App. 19a, 29a. Appellant had raced his horse once in New York, at Belmont Park, while his license application was pending before the Board. App. 13a, 14a ¶¶ 7, 8, 16a ¶ 17. *See* § 4002.6, New York Codes, Rules and Regula-

* Appellant gives two reasons why the eight examples of his publications that the Board considered are not probative of his fitness for a thoroughbred owner's license. Appellant first contends that the examples do not mention him "by name". Jurisdictional Statement at 11. True, the examples do not mention appellant by the name Lasky. They do mention him by the names Cashem or Warren, aliases he does not disown. Appellant next contends that the examples are of corporate publications without relation to any corporate officer. *Id.* at 11, 12, 17. Two incontrovertable facts are omitted. First, the record does not even suggest that any of the organizations for which appellant writes or publishes are incorporated. Second, the eight examples give the appellant's personal guarantee, either as Cashem or Warren, not a corporate guarantee. See discussion above at 5-7. Indeed, two of the examples even include the appellant's photograph. S. App. 14a, 16a.

tions, title 9, authorizing a racing steward to permit an owner to enter his horse pending the Board's disposition of his license application.

The Board's written decision finds that appellant is a tout and not fit for a license under Racing, Pari-Mutuel Wagering and Breeding Law § 213(2), while he continues in that occupation. App. 27a, 28a. The Board first notes its review of examples of appellant's publications. App. 27a. It then sets forth its conclusions, drawn from that review, about appellant's activities as a tout (App. 27a-28a): he tries to create the impression that he has inside information about which horse will win a race; he clearly implies that he has information that goes far beyond what the best legitimate handicapper could provide; and he suggests that he has obtained the information in a manner contrary to law or, at least, contrary to the rules of racing. The Board concludes by giving two reasons why licensing the appellant would be inappropriate (App. 28a-29a): first, licensing the appellant might be taken by the public as an endorsement of his touting activities when the legislature and the Board consider those activities inconsistent with racing's best interests; and second, licensing the appellant would create actual and apparent conflicts of interests which would be harmful to the public perception of racing. For example, appellant's sale of tips could create conflicting financial incentives for him in races in which his horse was entered; he could affect the odds in the races in which his horse was entered by selling more, less or various tips; and his past selections, later competing against his own horse, would affect the odds even if he did not sell selections for the later races. App. 28a. *See* e.g. S. App. 6a, 11a, 13a.

where appellant tries to restrict the distribution of his tips to protect the odds.

Appellant immediately challenged the Board's denial of his license application in a proceeding in state supreme court under Article 78 of the New York Civil Practice Law and Rules. On June 21, 1982, a special term of that court affirmed the Board's decision. App. 6a. The special term opinion repeats the description of appellant's touting activities provided by the Board and the actual and apparent conflicts of interest the Board noted. App. 3a-4a, 5a. It then addresses and rejects appellant's two legal claims. App. 4a-6a. Appellant's contention that § 213(2) is overly broad or unconstitutionally vague unless tout is defined as an individual who sells different winners in the same race to different bettors is considered first. App. 4a. In response, the special term adopts the definition of tout offered by the Board, i.e. an individual who sells racing selections for gain, often purportedly based on inside information. App. 4a-5a. It then upholds the statute, finding that a "fair reading of its language, as measured by common understanding and practice," clearly gives adequate warning of the conduct it prohibits. App. 5a-6a. The state's vital interest in protecting the integrity of horse racing because of the related gambling activity and the fact that the sport, like greyhound racing (*Medina* v. *Rudman*, 545 F.2d 244, 250-51 [1st Cir. 1976], *cert. denied* 434 U.S. 891 [1977]), is not a common occupation, are cited as supportive. App. 5a, 6a. Special term next considers appellant's contention that he had a due process right to an administrative hearing before the Board acted on his application. App. 6a. *Fink* v. *Cole*, 1 N.Y.2d 488 (1956), is cited for the proposition that there is no state

law right to a predetermination hearing upon the denial of a thoroughbred owner's license. *Ibid.* Special term then concludes that appellant has no "claim of entitlement" which requires the Board to grant him a hearing. *Ibid.*

Appellant pursued his challenge to the Board's denial of his license application to the Appellate Division, First Department. That court affirmed the special term judgment on November 15, 1983. App. 9a. The New York Court of Appeals summarily dismissed appellant's further appeal on June 14, 1984, after permitting him an opportunity to be heard, on the ground that no substantial constitutional question was directly involved. App. 10a-11a.

THE COURT IS WITHOUT JURISDICTION OVER THIS APPEAL.

A. Appellant Does Not Have A Due Process Right To Be Heard By The New York State Racing And Wagering Board Before It Decides His Application For A Thoroughbred Owner's License.

1. *Appellant Does Not Have A Protected Interest In The Administrative Decision On His Application.*

Appellant's first challenge to New York Racing, Pari-Mutuel Wagering and Breeding Law § 213(2),(3) (McKinney 1984), formerly New York Unconsolidated Laws § 7915 (2),(3) (McKinney 1979), invokes the Due Process Clause to protect two supposed interests in "liberty" or "property." Jurisdictional Statement at 13-16. Prior decisions of this Court in *Paul* v. *Davis*, 424 U.S. 693 (1976), and *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), immediately defeat the challenge. They foreclose any possibility that appellant's

asserted interests—protecting his good name and entering his horse in races on which betting is legal—can be encompassed by the terms "liberty" or "property" and, perforce, leave appellant's concerns outside the protection of the Due Process Clause.

Appellant's asserted reputational concern refers to the denial of his application for a thoroughbred owner's license by the New York State Racing and Wagering Board (the "Board") on January 25, 1982. Jurisdictional Statement at 13, 14. Appellant claims that the Board's decision falsely labels him a tout, and makes related, presumably false, findings about the negative effect his occupation has on his fitness for a license, his improper efforts to obtain inside wagering information and conflicting interests which would burden him and the public were he to be licensed and continue his occupation. *Id.* at 10-12, 13-14. Appellant then claims that the Board stigmatized his reputation when it published the decision. *Id.* at 13-14.* Even if appellant's claims about the Board's decision are accepted as true, they are not sufficient to establish a protected interest in "liberty" or "property." *Paul* v. *Davis, supra.* There, this Court, faced with a claim by an individual falsely identified as a shoplifter by the police, said: " '[S]tigma' . . . [to] reputation alone, apart from some more tangible interests . . . . is "[neither] 'liberty' [nor] 'property' by itself

* Appellant miscites § 4001.7, title 9, New York Codes, Rules and Regulations ("NYCRR"), to establish the fact that the Board must publish its decisions. Jurisdictional Statement at 14. The correct citation is 9 NYCRR § 4001.8. The section requires the Secretary to the Board to "certify" Board decisions as "official action" and to "promulgate" them. *See Paul* v. *Davis*, 424 U.S. at 713-14 (federal Constitution does not protect against the publication of records of official acts).

sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701.

Appellant tries to show that his supposed interests in "liberty" and "property" survive scrutiny under *Paul* v. *Davis, supra,* because he has a "tangible interest," apart from his reputation, in the Board's decision. Jurisdictional Statement at 13, 14-16. The nonreputational interest appellant asserts is entering his horse in races on which betting is legal. *Ibid.* To establish it as "tangible" under *Paul* v. *Davis,* appellant is obliged to show that the interest arises from either of two sources, that it existed before the Board's decision and that the decision distinctly altered or extinguished the interest. 424 U.S. at 700, 710-13. One appropriate source for the interest is a specific federal constitutional guarantee which the Due Process Clause of the Fourteenth Amendment makes applicable to the states. *Id.* at 700, 712-13. *See Board of Regents* v. *Roth,* 408 U.S. at 569-72 (listing specific constitutional guarantees made applicable to the states by the Fourteenth Amendment). The other appropriate source is a state law entitlement—a right "initially recognized" and "vouchsafed" to the individual under state law and "thereby protected" under the Due Process Clause of the Fourteenth Amendment. *Paul* v. *Davis.* 424 U.S. at 710, 712.

The first source appellant claims for his asserted "tangible interest" in racing his horse is an underlying state law entitlement to either a thoroughbred owner's license or a predetermination hearing before the Board. Jurisdictional Statement at 14. 16. *See Paul* v. *Davis,* 424 U.S. at

710-12 and discussion just above. Reference to the relevant New York law, Racing, Pari-Mutuel Wagering and Breeding Law § 213, establishes that the supposed state law entitlement does not exist.* Thoroughbred owners cannot race in New York unless and until they obtain licenses under § 213 (1),(2). They are not entitled to licenses, or to apply for licenses, under any other provision of state law as appellant's entitlement theory would require. Similarly, applicants for thoroughbred owners licenses in New York are denied a predetermination hearing right under § 213(3). They are not granted a hearing right under that subdivision or any other provision of state law as appellant's entitlement theory would require. In *Fink* v. *Cole*, 1 N.Y.2d 48 (1956), the New York Court of Appeals construed subdivision 3 as denying a predetermination hearing right and found, in consequence, that applicants for New York thoroughbred owner licenses have no statutory entitlement to such hearings. *See also* special term opinion at App. 6a, noting absence of statutory entitlement to predetermination hearings.**

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* At one point (jurisdictional statement at 14), appellant claims a "legitimate expectation of continued licensure in New York" without identifying any relevant state law. The claim apparently relies on the fact that appellant's horse raced once at Belmont Park, in September 1981, while appellant's license application was pending before the Board. App. 13a-14a ¶¶ 7, 8, 16a ¶ 17. The relevant New York Law is 9 NYCRR § 4002.16, which authorizes a racing steward to permit an owner "to start" pending [Board] action" on his license application. Any expectation of licensure that appellant may claim from this source could not have continued past January 25, 1982, the date the Board denied his application. App. 29a.

** New York's regulation of harness racing licenses, considered in *Barry* v. *Barchi*, 433 U.S. 55 (1979), is distinguishable on this point. Racing, Pari-Mutuel Wagering and Breeding Law § 321, formerly Unconsolidated Laws § 8022, the statute referrenced in *Barchi*, *id.* at 60 n. 8, grants applicants for harness racing licenses a predetermination hearing right.

Indeed, appellant himself acknowledges that his asserted state law entitlement is non-existent when he admits that the interest the entitlement is supposed to protect—entering his horse in races on which betting is legal—is a right he would have acquired only if the Board had granted his license application. Jurisdictional Statement at 10, 14-16. Since appellant admits that his only right to race in New York arises from the state license statutes, he must also admit that he has no state law right to race outside the license statutes. Therefore, appellant's asserted state law entitlement claim depends on a predicate which, given his initial admission, does not exist. The same admission also forecloses any possibility that appellant can establish a "tangible interest" under *Paul* v. *Davis*, 424 U.S. at 710-12, with a state law entitlement as its source. See discussion *ante*, at 11-12. Moreover, again given appellant's admission that he would only obtain a right to race if the Board had granted his license application, he cannot demonstrate, as *Paul* v. *Davis* requires, that the Board's decision denying his application distinctly altered or extinguished a pre-existing right. See discussion *ante*, at 12. Notably, all of the cases appellant cites in the jurisdictional statement at 13-16 (except *Medina* v. *Rudman*, 545 F.2d 244 [1st Cir. 1976], *cert. denied* 434 U.S. 891 [1977], discussed below) involve the loss of pre-existing "tangible interests" and are distinguishable from the case at bar for that reason.

The second source appellant claims, or appears to claim, for his asserted "tangible interest" in racing his horse is a specific federal constitutional guarantee. Jurisdictional Statement at 15-16. *See Paul* v. *Davis*, 424 U.S. at 700, 712-13 and discussion *ante*, at 12. The guarantee appellant in-

vokes is the right "to engage in the common occupations of life," *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), a right this Court recognized as a protected "liberty" interest in *Board of Regents* v. *Roth,* 408 U.S. at 572. However, racing a thoroughbred horse when betting is legal is not a "common" occupation, i.e., one in which the citizenry at large has a right to participate. *Medina* v. *Rudman,* 545 F.2d at 250-52 (participating in greyhound racing when betting is legal held not a common occupation). Like other activities states may prohibit in the public interest, access to thoroughbred racing and the associated gambling activities is discretionary with the Board and strictly regulated. *See Medina* v. *Rudman, supra; N.Y.S. Liquor Authority* v. *Bellanca,* 452 U.S. 714, 717-18 (1981) (state's power to ban an activity entirely, there the consumption of alcohol, includes the lesser power to limit the circumstances under which it will be allowed); *Barry* v. *Barchi,* 443 U.S. at 64-65 (state interests in the integrity of harness racing are significant and may be strictly enforced, *inter alia,* by the prehearing suspension of licenses); *Lewitus* v. *Colwell,* 497 F. Supp. 439, 445-46 (D. Md. 1979) (regulation virtually identical to statute involved in case at bar held to reflect particularly important and sensitive state issues that require strict regulation). *Contrast* jurisdictional statement at 15-16, where appellant suggests that thoroughbred racing is a "common occupation" in New York because many licenses may be issued and tries to discredit special term's reliance on *Medina* v. *Rudman* (App. 6a) on the theory that the state's interests in racing-related gambling are protected adequately if only race track owners, not race horse owners, are regulated.

Appellant attempts to enhance the "tangibility" of his interests in the Board's denial of his license application by claiming that the denial has, or will, foreclose his subsequent licensure in New York and other jurisdictions. Jurisdictional Statement at 14-15. The effort is in vain for several reasons. First, as shown above, appellant has no "tangible interests" in the Board's denial of his license application, and his effort to enhance these nonexistent interests by claiming their present or potential foreclosure is, therefore, a nullity. Second, the Board's denial has only transitory effect in New York. It is directed to the appellant "while he is engaged in his current occupation" (App. 28a), leaving him free to reapply if he changes his occupation or even if he just wants to try to persuade the Board to reach a different result. *See Bonacorsa* v. *Barry*, 664 F.2d 346, 347 (2d Cir. 1981) (denial of harness license held without foreclosing effect for similar reasons). Third, although appellant claims other jurisdictions have, or will, give reciprocal effect to the Board's decision, he does not provide the decisions on his license applications or the content of the rules that he claims require this result.* Indeed, were other jurisdictions to apply the Board's decision in the manner appellant suggests, his due process challenge would be properly directed against their actions, not against the Board. Fourth, even assuming that the Board's decision has, or will have, some impact on appellant's racing opportunities in New York and other states, that impact is far afield from

* Appellant mischaracterizes the New York rule on point, 9 NYCRR § 4042.4(a),(b). It bars individuals from New York tracks, subject to further action by the Board, whose licenses have been suspended or revoked, not denied, by other jurisdictions. *Contrast* jurisdictional statement at 15, where appellant claims that the regulation bars individuals whose licenses have been denied by other jurisdictions.

the effects this Court has considered sufficient to support the foreclosure of protected or "tangible interests." *See Paul* v. *Davis*, 424 U.S. at 701-10; *Board of Regents* v. *Roth*, 408 U.S. 573-74. Under the Board's decision, the appellant is not foreclosed from all racing licenses, much less all public employment. Nor is he foreclosed from a particular profession or occupation, either permanently or for a particular period of time.

2. *Appellant Does Not Have A Right To Be Heard Before The Administrative Agency Denies His Application.*

Appellant's claim that he has a due process right to be heard before the Board decides his application for a thoroughbread owner's license depends on his characterization of the tout label as false. Jurisdictional Statement at 10-12, 13-14. In this case, the label must be accepted as true, and appellant's claim dismissed for that reason even if his asserted reputational and horse racing interests are considered *arguendo* to be "liberty" or "property" interests.

The due process hearing appellant seeks is intended to provide an individual whose reputation has been, or may be, stigmatized with an opportunity to clear his name. *Codd* v. *Velger*, 429 U.S. 624, 627 (1977); *Board of Regents* v. *Roth*, 408 U.S. 564, 573 n. 12 (1972). If it is to serve any useful purpose, there must be "some factual dispute" about the truth of the charge the party seeking the hearing claims as the source of the stigma. *Codd* v. *Velger*, *supra* (terminated public employee who did not raise factual dispute about truth of allegedly stigmatizing charge held not entitled to due process hearing to clear his name).

Appellant is in no better position with respect to his claimed hearing right than the respondent in *Velger*. Although appellant repeatedly characterizes the Board's finding that he is a tout as false and inaccurate (jurisdictional statement at 10-12, 13-14, 17-18), he does not dispute the factual predicate for the charge, the contents of the eight tip sheets on which the Board relied in denying his license application. See discussion *ante*, at 4-7, 8-9. Rather, he accepts their content "at face value," or as true, in this Court (jurisdictional statement at 11), as he did below (brief for petitioner-appellant in the Appellate Division, Second Department at 10), and rests his claim entirely on a question of state law. The question is the appropriate definition of the word tout (jurisdictional statement at 17-19), a question that could not be tried at the predetermination administrative hearing appellant claims was unconstitutionally denied him.

B. Appellant's Interest In Free Speech Was Not Involved In The Consideration Of His Application For A Thoroughbred Owner's License By The New York State Racing And Wagering Board, And Even If It Was Involved, It Was Not Infringed.

Appellant's second challenge to New York Racing, Pari-Mutuel Wagering and Breeding Law § 213(2),(3) (McKinney 1984), formerly New York Unconsolidated Laws § 7915 (2),(3) (McKinney 1979), invokes a supposed free speech interest in the consideration of his application for a thoroughbred owner's license by the New York State Racing and Wagering Board (the "Board") and, perhaps, in a predetermination hearing before the Board. Jurisdictional Statement at 16-17. To support the challenge, appellant

offers six statements about freedom of speech and the nature of his business which are, variously, irrelevant and false and, perforce, insufficient. *Ibid.*

Four of appellant's statements (the references to *Perry* v. *Sinderman*, 408 U.S. 593 [1972], and *Board of Regents* v. *Roth*, 408 U.S. 564 [1972] in the jurisdictional statement at 17 are excepted) are both irrelevant and false because they assume that the Board's denial of appellant's license application regulated his occupation as a tout or his advertising of his occupation when, instead, it prohibited him from entering a thoroughbred horse in races on which betting is legal.

Four of appellant's five statements about freedom of speech, including the reference to prior adversary hearings and *Board of Regents* v. *Roth, supra* (and again excepting the reference to *Perry* v. *Sinderman, supra*) are irrelevant because, as the cases appellant cites demonstrate, they refer to direct restraints on speech, not to license qualifications. *See* e.g. *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980) (bill inserts discussing public concerns prohibited); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977) ("for sale" and "sold" signs on residential property prohibited); *Virginia State Board of Pharmacy* v. *Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976) (advertising prescription drug prices prohibited), all cited in the jurisdictional statement at 17. Indeed, the quotation from *Board of Regents* v. *Roth* appellant cites to support his claimed right to a predetermination hearing on his license application (jurisdictional statement at 17) states that it is referring to direct restraints on speech: "When a State would *directly impinge* upon in-

terests in free speech or free press, this Court has *on occasion* held that opportunity for a fair adversary hearing must precede the action whether or not the speech or press interest is clearly protected under substantive First Amendment standards." 408 U.S. at 575 (emphasis added).

The statement, drawn from *Perry* v. *Sinderman,* 408 U.S. at 597, that government cannot deny a benefit to person "on a basis that infringes constitutionally protected interests," including his interest in free speech, is accurately set forth but irrelevant. Appellant does not inform us how the denial of a license to race a thoroughbred horse infringes his free speech interest other than to suggest, in error, that all denials of government benefits based on reasons that are spoken, written or speech-related infringe free speech. See discussion *post*, at 21-22.

The statement that appellant's solicitation of money in exchange for tips on sure winners is attributable to a corporation, and not to him (repeated elsewhere in the jurisdictional statement at 11, 12), is false. First, the record does not include an allegation of corporate status for any of appellant's enterprises. Second, each of the five examples of appellant's solicitations annexed to the Board's decision offer appellant's personal advice and guarantee. See discussion *ante*, at 5-6. The three other examples the Board considered are to the same effect. *Id.* at 6-7.

Appellant's object in invoking the First Amendment—to prohibit the Board from relying on written examples of his solicitations when it considers his license application—reveals a fundamental error in his legal analysis. *See* Jurisdictional Statement at 16-17. Appellant is trying to

use the First Amendment to immunize himself from the consequences of what he has said rather than to support his interest in unrestricted, or relatively unrestricted, speech about matters of public concern or commerce. No decision of this Court has attributed this immunizing effect to the protections of the First Amendment, and were appellant's view accepted, it would have at least two far-reaching consequences that are opposed by established practice and precedent. First, quasi-judicial and judicial tribunals would not be able to receive documentary evidence adverse to its author. Notably, the documentary evidence which appellant is trying to suppress in this case is of incontestable authenticity and probity, amounting to a virtual admission that he is a tout.* Under established evidentiary practice, it would be received and relied on by any tribunal in the land. Second, the government would not be able to rely on an individual's past statements in deciding whether to deny, suspend or revoke a public benefit. In fact, the government routinely relies on past statements when, as here, they are relevant, and its conduct in this regard has been held not to infringe any First Amendment interest. *See* e.g. *Connick* v. *Myers*, 103 S. Ct. 1684, 1690-94 (1983) (discharge of nontenured government employee for speech-related insubordinate conduct held not to infringe employee's First Amendment interests); *Arnett* v. *Kennedy*, 416 U.S. 134, 160-63 (1974)

* Appellant wrote all but one of the eight solicitations the Board considered. *See* S. App. 1a-6a. The statute involved, Racing, Pari-Mutuel Wagering and Breeding Law § 213(2), designates character, fitness and certain occupations as relevant license qualifications. The solicitations, whose content appellant accepts as true (jurisdictional statement at 11 and discussion *ante*, at 4 n. **), describe appellant's occupation and, necessarily, his character and fitness, in literally his own words.

(discharge of tenured employee for speech-related insubordinate conduct held not to infringe employee's First Amendment interests). Indeed, if, as in *Connick* and *Arnett*, employees of long standing, one with tenure, may be discharged for speech-related reasons without infringing their First Amendment interests, the Board, a fortiori, may deny appellant's original application for a thoroughbred owner's license for speech-related reasons without infringing his First Amendment interests.

C. New York Racing, Pari-Mutuel Wagering And Breeding Law § 213(2) is not Unconstitutionally Vague Because It Includes The Word Tout.

Appellant's third challenge, limited to New York Racing, Pari-Mutuel Wagering and Breeding Law § 213(2) (McKinney 1984), formerly New York Unconsolidated Laws § 7915 (2) (McKinney 1979), claims that the statute is unconstitutionally vague because the word tout does not give adequate warning about the type of conduct the statute prohibits. Jurisdictional Statement at 20. An examination of appellant's arguments (*id.* at 17-19), in light of the authorities appellees provided below and the decision of the state supreme court at special term, establishes that appellant is not pursuing a question of constitutional dimension but merely stating a preference for his own definition of the word tout.

A fundamental cannon of statutory construction requires that words be given their "ordinary, contemporary and common meaning" unless they are defined by the statute itself. *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); *Burns* v. *Alcala*, 420 U.S. 575, 580-81 (1975). *Con-*

trast jurisdictional statement at 17, where appellant asserts that whatever tout means in "common parlance," the statute should adopt the meaning the word has in racing circles, and *id.* at 19, where he suggests that § 213(2) is vague because it does not itself define tout.

The Board defined tout in its submissions to special term as a person who sells winners of horse races for pecuniary gain. App. 27a-28a; affidavit of Stephen J. Cipot, sworn to February 5, 1982 ("Cipot affidavit") at ¶ 6. It satisfied the *Perrin-Burns* standard by providing two conforming regular dictionary definitions of the word (American Heritage and Webster's) and a conforming gambling dictionary definition (Scarne's). *See* Cipot affidavit ¶ 11 and Exhibit 5 thereto.* Special term adopted the Board's definition of tout and cited the authorities attesting to it as the "ordinary, contemporary and common meaning" of the word. App. 4a-5a. The court then rejected appellant's claim that Racing, Pari-Mutuel Wagering and Breeding Law § 213(2) was unconstitutionally vague (App. 5a), finding that a "fair reading of its language [including the word tout], as measured by common understanding and practice, clearly gives adequate warning of the type of conduct prohibited." *Id.* at 5a-6a. *Accord, Lewitus* v. *Colwell*, 479 F. Supp. 439, 443-44 (D. Md. 1979) (upholding virtually identical Maryland regulation against vagueness challenge and finding that the warning conveyed by the language was enhanced by "the specific 'nouns' 'bookmakers' and 'touts.'"

Against these authorities, appellant claims that the word tout has a more restrictive definition. Jurisdictional State-

* The Scarne definition (Cipot affidavit ¶ 11, Exhibit 5), like the Board decision (App. 27a-28a), included the notation that a tout's winning selections often purport to rely on inside information.

ment at 17-18. Appellant first notes that in racing circles, a tout is viewed as engaging in fraud and impropriety (*id.* at 18), an observation consistent with definition of tout adopted by special term since an individual who sells guaranteed winners, whether referenced to purported inside information or not, is engaging in fraud and impropriety. Appellant then claims that to be a tout in racing circles, an individual must express fraud and impropriety in a particular way. *Id.* at 17. According to appellant, he must sell different winners in the same race to different bettors. *Ibid.*

Appellant offers no credible authority to support his restrictive definition of the word tout. The Ainslie quotation (jurisdictional statement at 18) does not purport to define touting, but merely to illustrate it. The text of the California Penal Code is not provided (*ibid.*), and assuming it conformed with appellant's definition of tout, no reason appears why the definition of the word in New York must, or should, be the same as the definition in the criminal code of a foreign jurisdiction. The only other information appellant provides to support his definition are statements by two affiants who simply repeat appellant's definition. App. 24a ¶ 8; App. 26 ¶ 8. If this information may be characterized as authority at all, it is certainly not comparable to the objective authorities on which special term relied in adopting the Board's definition as the state law meaning of the word. See discussion *ante*, at 22-23.

Of the deficiencies in appellant's arguments for his more restrictive definition of tout, one is most critical—his complete failure to demonstrate why his definition avoids a finding that New York Racing, Pari-Mutuel

Wagering and Breeding Law § 213(2) is unconstitutionally vague when the Board's definition supposedly invites that finding. To make the required demonstration, appellant would have to have shown how § 213(2) provided a more adequate warning about the type of conduct it prohibits when tout means selling different winners in the same race to different bettors as distinguished from selling all bettors one winner in a race. Of course, appellant cannot make the required demonstration because one definition is no more adequate than the other in terms of the warning the statute provides. Indeed, since appellant has not, and cannot, establish that the definition of the word tout he offers is required to save § 213(2) from unconstitutional vagueness, his challenge to the statute on this point amounts to no more than a preference for his own definition over the state law meaning of the word.

D. Appellant's Claim That The Denial Of His Application For A Thoroughbred Owner's License By The New York State Racing And Wagering Board Was The Result Of Selective Prosecution Is Not Colorable.

Appellant's last challenge to New York State Racing Pari-Mutuel Wagering and Breeding Law § 213(2),(3) (McKinney 1984), formerly New York Unconsolidated Laws § 7519(2),(3) (McKinney 1979), alleges selective prosecution in violation of the Equal Protection Clause. Jurisdictional Statement at 20-21. The one allegation made in support of the claim—that handicappers have been granted thoroughbred owner licenses whereas touts have not (App. 24a ¶ 9)—denies the claim even colorable status.

As special term observed, handicappers and touts have different occupations. App. 4a. Handicappers rate entries

before post time and figure out the order of finish based on factors like distance, weight, track conditions and past performance. *Ibid.* Touts select a winner in each race, without announcing the chances of the other entries, and often present their selection as based on inside information not available to the best handicapper. App. 4a-5a, 27. Handicappers are engaged in completely legitimate activities. App. 4a, 27a. Touts are not. App. 4a-5a, 27a-29a. Thus, if the New York State Racing and Wagering Board has granted thoroughbred owner licenses to handicappers and denied them to touts, as appellant claims, it has not adopted a selective policy based on an arbitrary classification. *Oyler* v. *Boles*, 368 U.S. 448, 543 (1962). It has adopted an even-handed policy based on occupational differences that appellant ignores.

Conclusion

For the foregoing reasons, the appeal should be dismissed because the Court is without jurisdiction, the alternative request for a writ of certiorari to the New York Court of Appeals should be denied, and the appellees should be awarded the printing costs for the supplemental appendix.

Respectfully submitted,

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State of New York
Attorney for Appellees

ROBERT HERMANN
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JUDITH A. GORDON
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SUPPLEMENTAL APPENDIX

Example One

[LETTERHEAD OF]

NATIONAL TURF CLUB
SUITE 320
10 LIGHT STREET
BALTIMORE, MARYLAND 21202

SPECIAL ANNOUNCEMENT—RACING SECRETARY WILLIAM CASHEM WILL TRAVEL TO SARATOGA RACE TRACK, NEW YORK TO PERSONALLY SUPERVISE ONE OF THE BIGGEST AND MOST SPECTACULAR STABLE KILLINGS OF ALL TIME GOING WEDNESDAY, AUGUST 18TH.

LET HIM GIVE YOU THIS O.K.—DIRECT FROM THE SCENE OF ACTION IN NEW YORK AND I ASSURE YOU THAT YOU'LL WIND UP BETTING ON A WINNER!

Dear Racing Fan:

I'm sure you'll agree that the NATIONAL TURF CLUB needs no introduction and Racing Secretary William Cashem has become synonymous with WINNING RACING. His name has become highly regarded in racing circles and it's your GUARANTEE that when you do business with him—you are dealing with a bonafide and legitimate Horseman, a PROFESSIONAL in every sense of the word!

Operating as the exclusive behind-the-scenes agent for the National Turf Club, Bill Cashem has to make decisions on racing information that either spells [sic] Profits and Winners or losses and losers. Just let me recount what Bill Cashem did the last time he made the journey "up the road" to New York on Friday, July 16th. It was for a SPECTACULAR STABLE KILLING, a real money-making deal that

Example One

was planned weeks in advance. He was promised and promised an easy winner at a high price . . . 20-1 or better! Of course, he informed all National Turf Club patrons well in advance to take advantage of such a Golden Opportunity. Now here's what happened: The planned event went off without a hitch. The horse, BEYOND REASONING, came winging down the stretch to tally by 2½ widening lengths and paid a very solid $10.20 to WIN! Moreover, some days before the event he was told that there was just no way this filly would pay 20-1 ($40) . . . she'd win mind you, but that 20-1 payoff was out of the question. He was perplexed. He made a promise to his subscribers that not only would he get them an easy winner, but one that would pay off in the high 4 figures. Bill felt terrible. He did not want to lose his creditability. He had to do something. This is what he did. He reached in and got word on another "stable killing" scheduled for the very same day. The horse was name JAMIE DORN who ran up the track in her last start. But when Bill gets word, it's "the word." She won by 2½ lengths making one bold move deep in the stretch and returned $11.20 for every 2 bucks. And best of all, JAMIE DORN was in the 9th race that day and was the key horse in a $269 triple! That trip to New York amounted to a 25-1 WIN PARLAY as every participant who invested $20 BUCKS got back over $500 DOLLARS . . . and that's not counting the money they made with betting the triple. These are *all facts, not stories*! It was another Banner Day for NATIONAL TURF CLUB subscribers as thousands and thousands of dollars in profits were realized by Bill Cashem followers.

Why and how can such a thing happen, especially after you hear of all the losses suffered by so many racing

Example One

> fans. Why is William Cashem so successful, how does he do it? How does he pick winners day in and day out —you asked why?—I'll tell you! . . .

He's a professional. He knows everyone of importance around the racetrack. He's been dealing with the racing fraternity for more years than I'm sure he cares to remember and can boast of keeping the same patrons who joined his ranks from the very beginning. Racing Secretary Bill Cashem has a closet literally jammed packed with unsolicited testimonials and it's open to anybody who cares to read them. You're right. This is something to "crow" about. When people can continue doing business with somebody in this field for any length of time, you KNOW he must have PLENTY "on the ball"—because in this profession there is NO ROOM FOR A LOSER . . . ONLY WINNERS! And then to take the time to compose testimonial letters, that's all the thanks anybody could ever need. It's our Racing Secretary's best reward, to know you can do something— to be the best at it —and to be appreciated!

But let's get back to those WINNERS. We have set aside a day for a SPECTACULAR STABLE KILLING that has been planned for WEDNESDAY, AUGUST 18TH. It is very difficult for me to describe this SELECT piece of information, except to say that during the course of AN ENTIRE RACE MEET, something of this sort can come up once or twice at the very most, if at all.

This piece of information is really in a class by itself! On form, nobody will give this thoroughbred the slightest kind of chance to finish on the board. This speedster has been so well "hidden" that even most of the grooms and stablehands around the barn have given up on him. But this is

the way these horsemen have planned this caper . . . and when they cut this one loose for THE MONEY on WEDNESDAY, AUGUST 18TH, the race should prove "NO CONTEST"—this goodthing should gallop home on top with 3 or 4 lengths to spare!

[2] In this event on AUGUST 18TH, NOBODY WILL KNOW WHAT IS HAPPENING UNTIL IT IS TOO LATE TO DO ANYTHING ABOUT IT! That is, NOBODY BUT BILL CASHEM FOLLOWERS who will join with him on this Spectacular Stable Killing on AUGUST 18TH at SARATOGA RACE TRACK. To the average fan who picks up his newspaper the following day, it will seem like just another LONGSHOT that has "SNEAKED IN"—and to a certain extent, this will be true. This Betting Tool will "SNEAK IN" and catch everyone not on the "inside" napping . . . that is EVERYONE BUT NATIONAL TURF CLUB PATRONS under the expert guidance of WILLIAM CASHEM! We will KNOW and we will COLLECT: it is as simple as that!

> WILLIAM CASHEM WILL PERSONALLY MAKE THIS EXTENDED TRIP FOR ONE REASON AND ONE REASON ONLY: TO MAKE CERTAIN WE COLLECT ON A NO IFS, ANDS, OR BUTS WINNER!

I'm not at liberty to go into further details concerning this SPECTACULAR STABLE KILLING because ALL ANGLES and every bit of planning are being kept a closely guarded secret. The people behind this event are leaving NOTHING TO CHANCE—and this race shapes up as the MOST SOLID RACING INVESTMENT that we have been involved with in years. I honestly can't see how we can miss COLLECTING at the juiciest kind of odds.

Example One

BEST OF ALL, WILLIAM CASHEM WILL BE AT SARATOGA RACE TRACK PERSONALLY EACH MORNING ONE FULL WEEK BEFORE THE DATE THIS KILLING IS BEING PLANNED FOR—SO THAT HE CAN ATTEND TO EVERY DETAIL PERTINENT TO MAKING CERTAIN THAT THIS PROPOSITION WINDS UP BRINGING US HUGE 4-FIGURE PROFITS! EVERY FACTOR WILL BE CAREFULLY GONE OVER—NO LOOSE ENDS WILL BE LEFT UNTIED THAT MIGHT HINDER THE SUCCESS OF THIS EVENT . . .

AND WE'LL MAIL THIS O.K. SO THAT IT REACHES YOU AT LEAST 2 DAYS BEFORE POST!

Yes, we will service you personally! We'll get the letter out to you 5 days before this race is run and we will handle it personally. We don't want this information to "leak out" for any reason. I KNOW that we can count on this LONGSHOT to romp home the easiest kind of a WINNER and we'll send it off to you DIRECT FROM THE SCENE OF ACTION AT SARATOGA RACE TRACK, NEW YORK. We KNOW what we've lined up for you on AUGUST 18TH . . . don't miss this goodthing for any reason!

Getting back to this spectacular killing on AUGUST 18TH, it must be handled in the following manner. Commitments to the "smart money" contacts involved in this information runs into a really tremendous figure! But we have managed to keep your cost down to a minimum of ONLY $10 as the full fee. There will be no other propositions accepted!

No matter how much money you've sent in the past on WINNERS, and regardless of what your relationship with the National Turf Club, this $10 ADVANCE PAYMENT is a MUST! We can make no exceptions—this information is worth at least TEN TIMES THE $10 FEE we're asking: I advise you that you don't miss it for any reason.

Mail in your $10 payment right now! Use the handy envelope that needs no postage today. And please, don't hes-

Example One

itate or wait or think about it, because delay could cause you to miss out on one of the best racing investments you've ever made.

Act now! Mail your $10 today. We'll get you on the WINNER list and see to it that you get this O.K. by MAIL at least TWO DAYS IN ADVANCE of the race! This is definitely the BIGGEST EVENT of the SARATOGA RACING MEET so mail your $10 through immediately.

Your friend,
/s/ KEN MARTIN
KEN MARTIN
Turf Editor, National Turf Club

P.S. I know it's nice to be a big man with your friends and let them in on sure fire winning releases, but please, not this time. This is for our exclusive pickings, as every fluction [sic] of the tote board will mean Big Bucks for us. KEEP THIS RELEASE TO YOURSELF ONLY!

* * * * * MAIL THIS COUPON WITH $10 * * * * *

NATIONAL TURF CLUB
10 Light Street, Suite 320
Baltimore, Maryland 21202

Enclosed is $10 for the SPECTACULAR STABLE KILLING going on WEDNESDAY, AUGUST 18TH at SARATOGA RACE TRACK, NEW YORK. Please air mail this information to reach me at least 2 days in advance of the AUGUST 18TH date of Winning Action.

NAME _____

ADDRESS _____

CITY/STATE _____ ZIP _____

* *

Example Two

[LETTERHEAD OF]

NATIONAL TURF CLUB
SUITE 320
10 LIGHT STREET
BALTIMORE, MARYLAND 21202

[STAMP]

100%
PERFECT

A SPECIAL RACING INVESTMENT HAS BEEN ARRANGED FOR PRIVILEGED INVESTORS FOR SUNDAY, JUNE 28TH AT BELMONT PARK, N.Y.!

Dear Racing Fan:

We have just received the exclusive inside word on one of the most SPECTACULAR RACING INVESTMENTS ever to be planned at any major race track in the country: and it is with great pleasure that we are due to offer you the opportunity to participate in this stunning upset at BELMONT PARK, New York, provided of course, that you can meet the heavy financial obligation necessary for participation in this "SPECIAL" Racing Investment on SUNDAY, JUNE 28TH.

This is a COMPLETELY FOOLPROOF piece of racing business, set to earn "privileged investors" some really DECENT PROFITS. Why if you join the special group of "insiders" JUNE 28TH, you can plan on making a trip to your bank the very next day, MONDAY, JUNE 29TH, to deposit the biggest batch of racing PROFITS that you've ever COLLECTED!

The Horsemen involved in this coup, claim that this BETTING TOOL is in a spot he can't possibly miss winning!

Example Two

[Word illegible] form on this undercover runner points him out to look like a valid dud, which is just fine with us. Because while nobody gives this unknown a 2nd glance, he'll come charging home on top lengths ahead of his field—and we'll wind up with some of the Biggest Profit-taking ever! In fact, the public will not "believe their own eyes" when they see this one romp home easily without even "raising a sweat." They'll be caught totally unawares . . . and that's the way it will be! But You can Know Before, and get yourself a piece of the Biggest Kind of Profits Ever, if you join us on this gala money-making occasion

It is really a strong temptation for us to tell you how much we Know about this Special June 28th maneuver! However, if I don't keep these details Completely Secret, we could jeopardize our position with race track contacts. But believe me, we Know all that We Should Know! Saying anything further until it is time to Bet and Win on June 28th would be unwise. If there is any way possible for you to join this special group of investors on this "Super" situation at Belmont Park, N.Y., make sure you do so!

There Shouldn't Be the Slightest Factor
of Risk Involved With This Longshot Now!
Every Possible Element of Chance Will Be
Considered and Attended To . . . Everything
Possible to Make This the Most Solid Racing
Investment Ever Will Be Taken Care Of!

Our Fee for This "Special Racing Investment"
On June 28th Is One Hundred Dollars!

We are well aware that $100 is not a small fee to pay unless you are independently wealthy. If you can't afford the

Example Two

$100 fee, we understand. Our Win/[word illegible] information is certainly within everyone's budget. So avail yourself of this other excellent WINNER service, for consistent profit-making.

But, of course, if you want the BEST—and if you can afford to handle a minable [sic] investment [sic: word omitted] one piece of racing information in a class all by itself, make it your business not to miss this Special Racing Investment on JUNE 28TH for extra-ordinary PROFIT TAKING! Mail your $100 remittance NOW!

[2] [Four lines illegible.]

Join the "privileged group and win big. Mail $100 today. This is 100% perfect: [sic: rest of sentence omitted.]

* * * * "100% PERFECT" INVESTMENT * * * *

NATIONAL TURF CLUB
10 Light Street, Suite 320
Baltimore, Maryland 21202

Enclosed is my $100 payment! Please list me to receive your "Special Racing Investment" going SUNDAY, JUNE 28TH, at BELMONT, N.Y. I'll phone (301) [number illegible] on that day after 10 A.M. COLLECT for this SOLID WINNER!

NAME _____

ADDRESS _____

CITY/STATE _____ ZIP _____

* * * * * * * * * * * * * * * * * * * *

Example Three

MIKE WARREN SPORTS

13966 Seal Beach Blvd.
Seal Beach, CA 90740 (213) 594-4638

I'VE UNCOVERED A SECRET
MOVE GOING AT SANTA ANITA'S
OAK TREE MEET
ON SATURDAY, OCTOBER 31

Only 100 of My Friends
Can Get This Winner!

Dear Friend:

We've ripped them up in Del Mar with winners as Berry Bush, Gam Bey, French Charmer, Prodigious, Advocatum, Chablis, Tizon and dozens others . . . many paying boxcar prices.

But, the best score is coming on Saturday, October 31. My backstretch sources have ferreted out a super runner, a will win horse so strong that I Guarantee This Horse Will Win!!

[Line drawing not reproduced. Message in bubble states:] Confidential to Top Subscribers only!

Example Three

The word on this horse is so secret that only my most inside people know about it . . . and the word will not get out.

That means we can expect at least 10 to 1 mutuel on the surest thing since Spectacular Bid was the only horse to enter a race, this horse that my main man has spotted will make the Bid's walkover look like a tough event, so easy will this runner romp and at a price.

This horse is being prepared for a race to be run at Santa Anita on Saturday, October 31.

He Will Win, No Ifs, ands of Buts or Shoulda, Coulda, Wouldas. This Is the Strongest Play of the Year!

Now, to protect the price, I am only releasing the name of this horse to One Hundred customers and you, because you are such a good customer, your have a shot at getting in.

More . . .

[2] Usually, I ask that you pay me after you win, but this is an unusual case—information so strong that I had to lay out the money in advance. I don't usually do this, but this came from my best source and he is a man Who Is Never Wrong.

Example Three

So, the lucky 100 who get in must send a $100 payment in advance. The money should be wired to me by Western Union in my name to Mike Warren, c/o Western Union, 214 Locust Ave., Long Beach, CA 90802.

[Photograph of horse race not reproduced.]

The $100 is guaranteed. So strong is this selection that THIS HORSE MUST WIN OR YOU GET YOUR MONEY BACK PERIOD!

Subscriptions will be on a first come, first served basis so act today. Get the $100 guarantee horse for Saturday, October 31 by wiring the $100 payments to Mike Warren, c/o Western Union, 214 Locus Ave., Long Beach, CA 90802.

CALL

(213) 594-4638

and charge the $100 fee to your

MASTERCARD OR VISA

[Mastercard logo not reproduced.]

[Visa logo not reproduced.]

[Photograph of horse race not reproduced.]

I don't often get horses so strong that I can give a money back guarantee. If you can afford to make $10,000 or more act right now. Call us at 213-594-4638 or wire the money today to ensure your spot.

Example Three

The day before the race you will be sent a telegram with the name of the horse and what race he is in. The telegram is for your eyes only and you should not let anyone, not your spouse, not your father, not your brother-in-law. THIS IS THE HORSE FOR YOU TO SCORE . . . AND YOU ONLY!

I want to protect the price and so do you so don't even hint to anyone that this horse is running.

Wire the money or call today. October 31 is coming right up SO GET IN ON THE LUCKY HUNDRED!

Sincerely,

/s/ MIKE WARREN

MIKE WARREN

Example Four

[NEW YORK DAILY NEWS April 11, 1981]

How to rob race tracks legally.

The secret of how America's Number One Handicapper "stole" over $2,772,546 from the racetracks last year all legal—all legitimate—and how *you* can do the same.

First of all, let's get one thing straight. I'm not a gambler. I'm a businessman. So when I go to the track, I'm not placing a bet. I'm making an investment.

But unlike any businessman I ever heard of, I don't settle for a 10, 20, or 30% return on my investment, I insist on a profit of 300% . . . every single day . . . and what's more . . . I GET IT. Do I have your interest? Good. Now let me tell you how it works.

On a typical day at the track, when a certain type of race comes up, I look up the Past Performance charts in the Daily Racing Form. I spend no more than 5 minutes doing simple grade school arithmetic. Then, excusing myself from my guests at my table at the track restaurant, I place my bet and then I rejoin them. And as we resume our conversation, I sit there fully confident that I have an 83% chance of winning!

[Photograph of Mike Warren not reproduced. Caption states:]

Mike Warren noted turf analyst and self made millionaire who now wants to share his latest secret with you.

Example Four

You read it correctly: e-i-g-h-t-y t-h-r-e-e percent! And the track can't do a thing about it. It's all legal and all legitimate. If everybody knew what I know . . . if everybody had my "secret", the prices on these races would plummet to ground zero. But of course, no one does know the secret except the two of us—myself and a very special friend I'll tell you about later. Meanwhile [one and one-half lines illegible].

Notice the number? . . . $2,772,546
Sure I've had good years before—years where I did $500,000 and $600,000. But this year . . . Forget it!

[Facsimile of a portion of a 1979 tax return showing $2,772,546 not reproduced.]

The ball game is over. We've broken the bank. I can now rob racetracks at will!

[Stamped received April 21, 1981.]

Example Five

"Hi.
"I'm Mike Warren, and I'd like to tell you about pay-win . . . the amazing new way to sure-fire racing profits from The Baltimore Bulletin. We send you winners . . . you pay absolutely nothing until after you've won and collected. Fair enough? Read on . . ."

[Photograph of Mike Warren not reproduced.]

November 25, 1974

Dear Friend of the *Bulletin*:

When it comes to racing information, isn't it about time someone started giving you the *best of it*?

If you're like most racing fans, you don't mind paying for the *right information* . . . but you're tired of paying in advance for horses that don't win!

So here's a *money-winning service* that *costs you absolutely nothing* until you've 1) received our scheduled release *by mail—well in advance of post time*; 2) *made your wager* at the track or your favorite OTB office, [sic] and 3) *collected your money* from the cashier and *put your winnings in your pocket.*

Then—and *only* then—do you pay me for this winning information at the steady rate of a *$5 win wager*—and that rate *never increases.*

Example Five

You pay me my small fee only after you've won, only after I've given you winners, and only after you have *collected your money*! That's right. *NO* payment in advance . . . *NO* "enrollment" fees . . . *NO* partial remittance" to help pay for "administrative costs" or "postage and handling." We send you this information *in plenty of time for winning action* . . . and *all you do is cash tickets*!

"Hold it," you're saying right now," ". . . what's the catch?"

Believe it or not, *there is no catch*! This offer is made to you in good faith as one trusted friend to another . . . *and* you *risk absolutely nothing.* If I don't produce for you, I don't get paid. *It's as simple as that.* However, to discourage those that have no intentions of honoring their obligitations, I must ask that you send $5.00 with the coupon enclosed . . . but to show you beyond a shadow of doubt that my intentions are sincere, you may deduct this amount (Over, please) . . . [2] later [two lines illegible]. What could be fairer?

Of course, I realize that I'm taking a chance. There are a few unscrupulous people out there who will take advantage of this offer and then decide not to pay me after I send them winners. That's where the $5 comes in . . . at least I won't be left "holding the bag" completely. We live in an imperfect world, and, no matter how careful we are, what strategy we use, someone, somewhere, is going to try to get something for nothing.

Example Five

But I know that you are not one of them. You are known to me as an honest person. I know you will shoot straight with me . . . and you can be absolutely certain that I will always give you "the best of it" in return. Besides, I reason you'd have to be crazy not to part with a few dollars if I can show you the road to wealth with *enough money* to do *what you want*!

Now . . . let's talk about PAY-WIN. PAY-WIN is only three months old . . . but already has gained a national reputation as the *most fantastic winner-picker service in North America.* Plays average about five (5) a months, and here's the actual record to date:

[The chart that follows is set forth at 18a.]

Date	*Track*	*Horse*	*$2 Win Paid*	*$5 Gross Profit*	*$5 Gross Profit (Cum.)*
August 30	Belmont	John DeGreat	Lost	—	$ 5.00—
September 11	Belmont	Green Gambados	$20.00 WON	$ 50.00	45.00
September 14	Belmont	Big Spruce	$12.80 WON	32.00	77.00+
September 18	Belmont	Warminster	Lost	—	72.00+
September 24	Belmont	Spear Carrier	$16.00 WON	40.00	112.00+
September 30	Belmont	Splutterfuss	$ 8.60 WON	21.50	133.50+
October 7	Belmont	Turkish Coffee	Lost	—	128.50+
October 11	Belmont	Never Call Retreat	Scratched	—	128.50+
October 17	Aqueduct	American Mystery	$ 4.20 WON	10.50	139.00+
October 22	Aqueduct	Trupan	$31.60 WON	79.00	218.00+
October 28	Aqueduct	Never Retreat	$ 6.80 WON	17.00	235.00+
November 4	Aqueduct	Daisy Mason	$57.20 WON	143.00	378.00+
November 9	Aqueduct	Brown Cat	$ 6.80 WON	17.00	395.00+
November 20	Aqueduct	Warrens Folly	Scratched	—	
November 28	Aqueduct	True Knight	Results unavailable at press time.		

Example Five

There you have it. Fifteen (15) releases in just over three months . . . nine (9) winners, including five (5) double-digit payoffs, two (2) scratches, and a release that has not started as we go to press. Check it out. See for yourself if True Knight also wins his race November 28th. Still and all, I have a *batting average of almost 70% . . . and a $390 return on your initial investment!* The truth is *you can't help but make money with* PAY-WIN . . . *and isn't that nice for a change?*

How do I do it? I think you already know the answer to that one. I have the right contacts, the right connections . . . and I take mighty good care of them! You know as well as I do that this game is not for the lucky . . . it's for the informed. And that information costs money. I have no way to pay my sources except from the PAY-WIN profits I make after sending out a winning release. I'm taking the risk—not you! Aside from the $5 I'm asking you to put up which is fully deducted from the very first winner, all I ask of you is that—if you agree to participate in this service you remit the proceeds of a $5 win wager *after you've won and collected.*

That's all there is to it. You owe it to yourself to join the ranks of PAY-WIN subscribers . . . and to *help yourself to the most astounding profits you'll ever see.*

Just fill in and initial the enclosed "No-Risk Subsription Form" . . . a postage-paid envelope is provided for your

Example Five

convenience. *Could anything be easier?* Let's make some money!

Next 2 Winning Releases Scheduled for:
December 7th
December 16th

Yours for Winners,
Mike
/s/ MIKE WARREN
Turf Editor

P.S. If one winner a week isn't enough take a look at our DAILY PARLAY SERVICE enclosed. It's sensational! [Last three words only partially legible on copy.]

[Stamped received December 9, 1974.]